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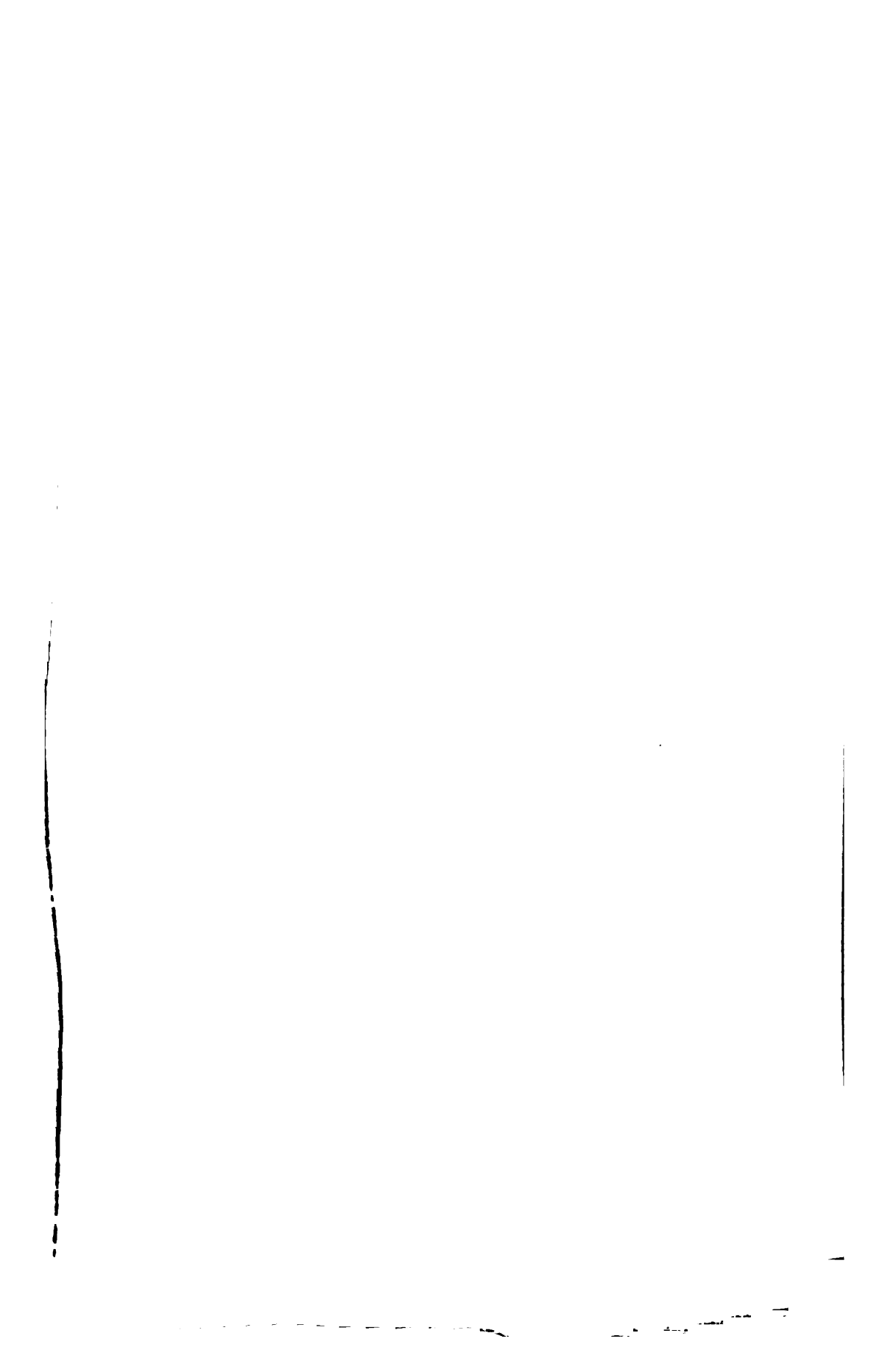
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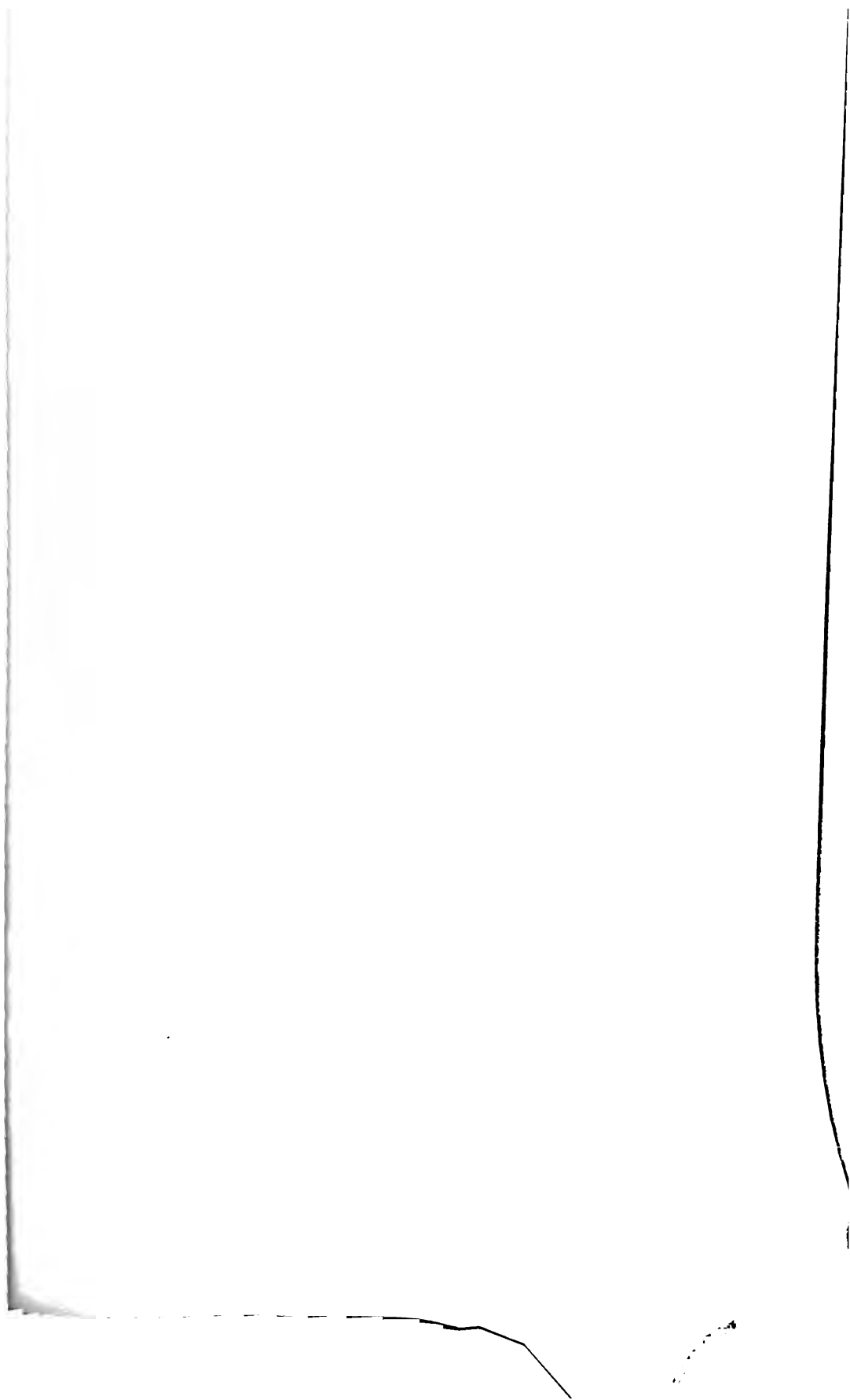




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# AMERICAN NEGLIGENCE CASES

[CITED AM. NEG. CAS.]

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A COMPLETE COLLECTION OF ALL REPORTED NEGLIGENCE CASES  
DECIDED IN THE UNITED STATES SUPREME COURT, THE UNITED  
STATES CIRCUIT COURT OF APPEALS, ALL THE UNITED  
STATES CIRCUIT AND DISTRICT COURTS, AND THE  
COURTS OF LAST RESORT OF ALL THE STATES  
AND TERRITORIES, FROM THE EARLIEST  
TIMES, WITH SELECTIONS FROM  
THE INTERMEDIATE COURTS.

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TOPICALLY ARRANGED  
WITH  
NOTES OF ENGLISH CASES AND ANNOTATIONS

PREPARED AND EDITED  
BY  
WALTER J. EAGLE

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VOL. XII

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1902

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## PREFACE.

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This volume (12 AMERICAN NEGLIGENCE CASES) completes the subject treated in Vol. 11 AM. NEG. CAS., and comprises the cases relating to the important topics of COLLISIONS and CROSSINGS, under which heads several subdivisions have been made, covering ACCIDENTS AT CROSSINGS AND ON RAILROAD TRACKS; COLLISIONS BETWEEN TRAINS AND VEHICLES; COLLISIONS BETWEEN TRAINS AND STREET CARS; COLLISIONS ON STREET CAR TRACKS; INJURIES TO PEDESTRIANS; PASSENGERS INJURED IN COLLISIONS; TRESPASSERS ON TRACK; INJURIES TO CHILDREN ON TRACK; EMPLOYEES INJURED IN COLLISIONS; DEFECTIVE TRACKS; HORSES FRIGHTENED BY NOISE OF TRAINS; ANIMALS ON TRACK INJURED OR KILLED IN COLLISION WITH TRAINS, ETC. The cases have been chronologically arranged and grouped in alphabetical order of States, and cover the decisions, on the topics treated, from the earliest period to 1897.

The cases reported herein are those decided in the highest courts of MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, and WYOMING, and in the UNITED STATES SUPREME COURT, CIRCUIT COURTS OF APPEALS and CIRCUIT COURTS; together with ANNOTATIONS and NOTES OF ENGLISH CASES.

Attention is called to the numerous NOTES OF CASES in which the authorities on the various topics treated herein are grouped under their respective States, this plan of condensation being rendered necessary by the mass of material relating to the subject of COLLISIONS AND CROSSINGS, nearly 1,500 cases being reported, abstracted or referred to in notes in this volume.



A reference to the NOTES OF CASES for authorities not cited in the TABLE OF CASES REPORTED will aid the practitioner in his search for parallel cases on the topics treated in this volume.

In addition to the cases reported and the several notes herein, a number of SPECIAL NOTES have been added, which, it is hoped, will materially aid the practitioner on various points of the LAW OF NEGLIGENCE, namely: NOTES ON THE RULE OF "STOP, LOOK AND LISTEN;" CONTRIBUTORY NEGLIGENCE; IMPUTED NEGLIGENCE; DEGREES OF NEGLIGENCE; PROXIMATE CAUSE; MUTUAL NEGLIGENCE; NOTES ON LEADING CASES (AMERICAN AND ENGLISH), ETC. Numerous CROSS-REFERENCES to topics of Negligence law are given throughout the volume. A complete list of the NOTES appears at the end of the TABLE OF CASES REPORTED.

The TABLE OF CASES CLASSIFIED, which precedes the INDEX, will enable the reader to see, at a glance, the causes of action and the injuries sustained in the cases reported in this volume.

Especial attention has been given to the INDEX, which is so arranged that the practitioner, in his search for points on particular subjects, may not be delayed by directions to cross-references. The cases and points indexed are placed under duplicate heads, avoiding cross-references, making the INDEX a ready guide to a case in point.

WALTER J. EAGLE.

NEW YORK, *October, 1902.*

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# AMERICAN NEGLECTANCE CASES.

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## BALTIMORE AND OHIO RAILROAD COMPANY v. STATE OF MARYLAND (USE OF STRUNZ).

*Court of Appeals, Maryland, April Term, 1894.*

[Reported in 79 Md. 335].

**COLLISION BETWEEN WAGON AND TRAIN AT CROSSING — PERSON RIDING BY INVITATION OF DRIVER KILLED — NEGLIGENCE OF DRIVER NOT CHARGEABLE TO FREE PASSENGER — CONTRIBUTORY NEGLIGENCE NOT A DEFENSE.** — In an action to recover damages for the death of a person caused by a collision between a train and wagon at a railroad crossing, the deceased not being in control of the horse or wagon but riding by invitation of the driver, it was held that a person accepting an invitation from a competent driver to take a gratuitous ride in a private carriage is not chargeable with the negligence of the driver, and contributory negligence of the driver is no defense to an action for damages for injury to, or death of, the person accepting the ride caused by collision of wagon with train (1).

Following Phila., *W. & B. R. R. Co. v. Hogeland*, 66 Md. 149.

1. *Collisions and crossings.* — For a ready aid to a case in point, the practitioner is referred to the topics "COLLISIONS" and "CROSSINGS" in the *AMERICAN NEGLIGENCE DIGEST*, a volume stating in succinct form the facts of the negligence cases covered in Vols. I-II *AM. NEG. CAS.*, and Vols. I-9 *Am. Neg. Rep.*, inclusive.

*Collisions between trains and vehicles.* — See Vol. II *AM. NEG. CAS.*, for actions arising out of collisions at crossings, decided in the highest courts of Ala-

bama, Arizona, Arkansas, California, Colorado, Connecticut, Dakota, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, and Maine, from the earliest period to 1897. In this volume of *AM. NEG. CAS.* (Vol. 12) the cases in the remainder of the States, together with those in the Federal courts, relating to the topic "COLLISIONS AND CROSSINGS," are reported, completing the subject treated in Vol. II. Subsequent cases to date are reported in Vols. I-II *Am. Neg.*

**RIGHT TO RECOVER FOR PERSONAL INJURIES SUSTAINED WHILE RIDING GRATUITOUSLY IN VEHICLE — NEGLIGENCE OF DRIVER — IMPUTED NEGLIGENCE.** — The generally accepted doctrine is that the contributory negligence of a carrier or the driver of a public or private vehicle, not owned or controlled by the passenger, and who is himself without fault, will not constitute a bar to the right of a passenger to recover for injuries received. The only principle upon which such contributory negligence could bar the right of recovery is that the driver should be regarded as the agent or servant of the passenger.

**APPEAL** from the Baltimore City Court. The facts are stated in the opinion. *Judgment for plaintiff affirmed.*

GEO. DOBBIN PENNIMAN, W. IRVINE CROSS, and JOHN I. COWEN, for appellant.

WILLIAM F. PORTER, and HENRY V. D. JOHNS, for appellee.

**Roberts, J.** — This action was brought in the Baltimore City Court, in the name of the State, as plaintiff, for the use of a widow and daughter of August Strunz, who was killed by a train of the defendant corporation. There was a verdict for the plaintiff and judgment thereon, from which the defendant has appealed.

The accident happened at what is known as the "Ridgely Street Crossing" of the Baltimore and Ohio Railroad, at the corner of Ridgely and Ostend streets, in the city of Baltimore. Ostend street runs east and west, and the defendant occupied the middle of the street at this point with two tracks, which consist of part of the main line between Baltimore and Washington. Ridgely street runs north and south, and the railroad crosses it at grade. The defendant, in compliance with article 4, § 10 of the Code of Public Local Laws, maintains a safety gate on the north side of its track at this point, and the gatemen's box is on the south side of the track, on Ridgely street. The train which caused the accident left Camden Station on the 10th of June,

1897, a series of Reports which gives the current cases arising out of negligence.

*Passengers injured in collision.* — A perusal of the indices to vols. 1-10 AM. NEG. CAS., will disclose references to many collision cases in which passengers have been injured, decided in the various states, from the earliest period to 1897. Subsequent actions to date

are reported in vols. 1-11 AM. NEG. CAS., and the current number of the series of Reports, a series of reports which supplement the AMERICAN NEGLIGENCE CASES.

*Maryland cases relating to collisions between trains and vehicles.* — The end of the case at bar, of cases arising out of collisions between vehicles and trains.

1893, at 3:01 in the afternoon, to run to Washington. It was behind schedule time, and was running at a rate of speed greater than the limit fixed by the city ordinance. The crossing is dangerous, rendered especially so from the fact that on the north-east corner of Ostend and Ridgely streets there is a high bank, which cuts off the view from Ridgely street of the track towards the east; and, at the time of the accident, a high wind was prevailing, making it almost impossible to hear the sound of an approaching train. It is not until a driver approaches to within forty feet of the track that a view in an easterly direction down the track can be obtained, and then only for a distance of about 226 feet. Both safety gates were up, and, in consequence of the severe winter weather, only one could be operated, and that with difficulty. Neither Schneider, the driver and owner of the horse and wagon, nor Strunz had knowledge of the defendant's inability to use the gates. As to the position and conduct of the flagman at the time of the accident the testimony is conflicting. Under these circumstances, August Strunz, as the invited guest of Adam Schneider, an able and competent driver of a quiet horse, accompanied him into the city of Baltimore from the town of Westport, which is also within the corporate limits of the city. Westport is located at the extreme end of Ridgely street, and a short distance from the railroad crossing. On their return trip to Westport, Schneider, driving his own horse and wagon, was seated on the right-hand and Strunz on the left-hand side of the front seat. The testimony is also conflicting as to the speed at which Schneider was driving as he approached the crossing, and as to whether he stopped, looked, and listened before he attempted to cross. There are, in point of fact, all through the case, two versions of the circumstances attending the accident, and two conflicting stories are told, the one diametrically opposed to the other.

There is substantially but one question in controversy on this appeal, and the argument on the part of the appellant clearly outlines the request that we review and modify the decision pronounced by this court in the case of Phila., Wilm. & Balt. R. R. Co. v. Hogeland, 66 Md. 149 (1). The two cases are in many

1. *The rule in the Hogeland case.* — The is stated in the syllabus to the official rule in PHILADELPHIA, WILMINGTON, report as follows:  
AND BALTIMORE R. R. CO. v. HOGE- "Railroad trains have the precedence of passing the crossings of public LAND, 66 Md. 149 (*October Term, 1886*),

respects identically the same as to the facts, and, such being the case, the law applicable to the one case ought to control in the other, unless we have violated some settled principles of the law in the decision of the Hogeland Case. It is contended in this case that it varies somewhat from Hogeland's in this: that, after

ways unobstructed; but it is the duty of those directing the trains to be careful to give all proper and sufficient signals of their approach, and to take all reasonable precautions in view of the nature of the crossings to avoid collision. And it is equally the duty of those approaching the crossings as travelers on the highways to approach with care.

"It is negligence *per se* for any person to attempt to cross the tracks of a railroad without first looking and listening for approaching trains; and if a party neglects this necessary precaution and receives injury by collision with a passing train, which might have been seen if he had looked, or heard if he had listened, he will be presumed to have contributed by his own negligence to the occurrence of the accident; and unless such presumption be repelled, he will not be entitled to recover for any injury he may have sustained.

"Evidence of the failure of the railroad company to give the regular signals of the approach of its train to a public crossing, and of the blowing of the whistle at the crossing just immediately before the crossing with the vehicle in which the plaintiff was riding which frightened the horse and caused the accident is sufficient to require the case to be submitted to the jury.

"The question of the want of care, or of the existence of contributory negligence on the part of the plaintiff, such as would defeat her right to recover, is one of fact for the jury under proper instructions from the court.

"The contributory negligence of a driver of a public or private vehicle

not owned or controlled by the passenger, and who is himself without fault will not constitute a bar to the right of the passenger to recover against a railroad company for injuries received in a collision of its train with the vehicle.

*The Hogeland case.*—The facts PHILADELPHIA, WILMINGTON & BALTIMORE R. R. Co. v. Hoagland, 66 149 (October Term, 1886), were as follows: Plaintiff, by invitation of brother-in-law, was riding in a horse covered wagon or carriage, and was under the exclusive control of a driver driven by the said brother-in-law. When the vehicle approached a crossing with defendant's tracks, the driver made a careful lookout for approaching trains but seeing none nor hearing a whistle, attempted to cross, when collision between defendant's train and the vehicle occurred, resulting in injuries to plaintiff. Trial in Circuit Court, Kent county, resulted in verdict and judgment for plaintiff \$5,833.34, from which judgment defendant appealed, but the same was affirmed, the judgment being by ALVEY, Ch. J., who cited the following authorities on the question of negligence, among them the Thorogood v. Bryan, 8 C. B. 501; Warman, 5 C. B. N. S. 101; Nett v. N. J. & Tr. R. R. Co., 225, 9 Am. Neg. Cas. 101; L. E. & W. R. R. Co. v. St. Clair, 47 N. J. Law, 161; Robins v. C. & H. R. R. Co., 66 N. J. 101; Erie R. R. Co., 71 N. J. 101; Clair St. R. Co. v. Eadie, 91; Wabash, St. L. & P. R. R. Co. v. Shacklet, 105 Ill. 364, 11 A. 429; Little v. Hackett, 110

Schneider stopped his wagon to look and listen for an approaching train, he remarked to Strunz, "It seems all right," and Strunz ejaculated, "Hum, hah," which Schneider thought expressed his assent that it was all right, and that it would be safe to cross. It is the generally accepted doctrine of the courts of this country that the contributory negligence of a carrier or the driver of a public or private vehicle, not owned or *controlled* by the passenger, and who is himself without fault, will not constitute a bar to the right of a passenger to recover for injuries received. The *only* principle upon which such contributory negligence could bar the right of recovery is that the driver should be regarded as the agent or servant of the passenger. But when, as in this case, he has no control over the driver, and does not own the vehicle, and is without blame, and there is no ground in truth and reality for holding him to be the principal or master, there is neither reason nor justice in holding him bound by the contributory negligence of the driver. *Hogeland's Case*, 66 Md. 149, 164, 165. But suppose Strunz, instead of assenting, had plainly indicated his dissent. He was not the owner nor in control of the horse and wagon, and in no position to restrain the action of Schneider. Would there, under these circumstances, be reason or justice in holding Strunz responsible for the conduct of Schneider? We think not; and, thus holding, we find no substantial difference between this case and the case of *Hogeland*.

The appellant has directed our attention to the case of *Dean v. Penn. R. R. Co.*, 129 Pa. St. 514, and that of *Brickell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 290, as contravening the rule announced by this court. A careful examination of *Dean's Case* will disclose the fact that the principles of law which it maintains in no manner conflict with the doctrine announced by this court. It condemns the decision of *Thorogood v. Bryan*, 8 C. B. 115, as being at variance with reason and common sense, and places to its credit many erroneous decisions which have followed in its wake (1). The case of *Brickell v. N. Y. C. & H. R. R. Co.*,

1. See note in 11 AM. NEG. CAS. 145-146, on the doctrine of *Thorogood v. Bryan*, 8 C. B. 115, showing the repudiation of its doctrine not only in the American courts but also in the English courts.

In *Thorogood v. Bryan*, 8 C. B. 115, it was held that a passenger in a pub-

lic conveyance, injured by the negligent management of another conveyance, cannot maintain an action against the owner of the latter, if the driver of the former, by the exercise of proper care and skill, might have avoided the accident which caused the injury.



*supra*, is the other case supposed to be at variance with the decision in Hogeland's Case, but it rests upon a state of facts differing widely from the circumstances of the case at bar or that of Hogeland. We have examined the case with care, and do not think it justifies the use sought to be made of it, as the authority upon which it rests does not sustain it. Like this court in Hogeland's Case, so the court in Brickell's Case quotes Robinson v. N. Y. C. & H. R. R. Co., 66 N. Y. 11, as authority. That there may be no misapprehension as to what was decided in Robinson's Case, we quote the language of Church, Ch. J., who delivered the opinion. He says: "The court held that if the defendant was negligent, and that the plaintiff was free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence which contributed to the injury. In determining this question, it is important to first ascertain the relation which existed between the plaintiff and Coulon, the driver. It is very clear, and was found by the jury, that the relation of master and servant did not exist; nor was Coulon, in any sense, the agent of the plaintiff. He had invited the plaintiff to ride to a certain place, which she declined, but stated that, if he would come on a specified day, she would ride with him to another place, where she desired to go for a visit; and it was during that ride that the accident occurred. I do not think the change affected the relation between the parties. It was the same as if the plaintiff had accepted the first invitation. It is therefore the case of a gratuitous ride by a female upon the invitation of the owner of a horse and carriage. The plaintiff had no control of the vehicle, nor of the driver in its management. It is not claimed but that Coulon was an able-bodied, competent person to manage the establishment, nor that he was intoxicated, or in any way unfit to have charge of it. Upon what principle is it that his negligence is imputable to the plaintiff? It is conceded that if, by his negligence, he had injured a third person, she would not be liable. She was not responsible for his acts, and had no right and no power to control them. True, she had consented to ride with him; but, as he was in every respect competent and suitable, she was not negligent in doing so. Can she be held, by consenting to ride with him, to guaranty his perfect care and diligence? There was no necessity for riding with him. It was a voluntary act on the part of the plaintiff, but it was not an unlawful or negligent act. She was

injured by the negligence of a third person, and was free from negligence herself, and I am unable to perceive any reason for imputing Coulon's negligence to her." (1) As already stated, the case of *Thorogood v. Bryan*, *supra*, had been for many years the groundwork of the English cases of imputed negligence, and had in some of the American decisions been accepted as correct in principle; but in the recent case of *The Bernina*, 12 Prob. Div. 58 (1887), it has been by the English court of appeals expressly overruled. (2) Lord Esher, M. R., after an extended review of the English and American cases, said: "After having thus laboriously inquired into the matter, and having considered the case of *Thorogood v. Bryan*, 8 C. B. 115, we cannot see any principle on which it can be supported; and we think that with the exception of the weighty observation of Lord Bramwell, though that does not seem to be a final view, the preponderance of judicial and professional opinion in England is against it, and that the weight of judicial opinion in America is also against it. We are of opinion that the proposition maintained in it is erroneously unjust and inconsistent with other recognized propositions of law. As to the propriety of dealing with it at this time in a court of appeals, it is a case which, from the time of its publication, has been constantly criticized, and no one can have gone into or have abstained from going into, an omnibus, railroad, or ship on the faith of the decision. We think that, now that the question is for the first time before an English court of appeals, the case of *Thorogood v. Bryan*, 8 C. B. 115, must be overruled." But, whatever conflict may be found to exist in the decisions relating to this subject, the decided weight of authority is in favor of the view heretofore expressed by this court; and, upon further reflection and consideration, we are of the opinion that the doctrine announced in the *Hogeland Case* is just and reasonable, and based upon sound principles of law which, in a case such as we are now considering, ought not to be modified or disturbed.

There are two exceptions taken to the admissibility of certain evidence. The first relates to the use of defendant's time-table for the purpose of showing the distances between certain stations on defendant's road, and also as showing the time in which defend-

1. See NOTE ON IMPUTED NEGLIGENCE, in L. R., 13 App. Cas. 1 (1888), overruling *Thorogood v. Bryan*, 8 C. B. 115, in 11 AM. NEG. CAS. 151-156.

discussed in the NOTE ON REPUDIATION

2. See the case of *The Bernina*, L. OF THE DOCTRINE OF THOROGOOD *v.* R., 12 Prob. Div. 58 (1887), affirmed BRYAN, 11 AM. NEG. CAS. 145-146.

ant's engineers and conductors were directed to run its trains between the same stations — such stations being those located between Camden Station and the Ridgely street crossing — when the accident happened. We fail to see how the defendant has been injured by the use made of the time-table, especially when considered in connection with the other testimony in the cause. Whether the court erred or not in the admission of the time-table offered in evidence, as an abstract legal proposition, will not necessarily justify a reversal of the judgment. If the evidence offered and admitted could not properly have influenced the jury to a result different from that at which they arrived from the consideration of the other evidence in the cause, then in such case, if it were improperly admitted, the error would have been a mere abstract error, which would not work a reversal of the judgment. It has been almost universally held that neither the admission nor the exclusion of testimony, when it does not appear to have affected the result or prejudiced the appellant, will be regarded as sufficient ground for reversal.

The second exception is taken to the admissibility of one of the rules of the defendant company, regulating the speed of passenger trains, but we see nothing in it calculated to improperly interfere with or prejudice the defendant.

The instructions asked by the plaintiffs were properly granted. Nor do we find any error in the action of the court below in rejecting the defendant's first, third, fourth, sixth, seventh, eighth, and ninth prayers. The defendant's eighth and ninth prayers contain the propositions of law which we have discussed at some length herein, and they have been disposed of by what has already been said. It seems to us that, by the defendant's second, fifth, and tenth prayers, granted by the court, the jury were instructed in terms quite as favorable as the defendant was entitled to receive. The judgment must therefore be affirmed. Judgment affirmed, with costs.

#### NOTES OF MARYLAND CASES RELATING TO COLLISIONS BETWEEN VEHICLES AND TRAINS.

See the following Maryland cases arising out of collisions and accidents at crossings to persons driving across railroad tracks.

*Driving across track in covered wagon — Contributory negligence.*

In *STATE (use of Foy) v. PHILADELPHIA, WILMINGTON & BALTIMORE R. R. Co.*, 47 Md. 76 (*April Term, 1877*), judgment for

defendant was affirmed in action for negligent killing of a person who, while riding alone in a covered carriage and driving at a slow pace, was struck by defendant's express train as he was crossing the railroad track. The usual signals of approach of train were given, but the deceased drove on without stopping. *Held*, that deceased was guilty of contributory negligence or want of ordinary care. It was also *held* that "railroad trains are liable to be detained by various causes, without any fault of the company, and negligence cannot be imputed to the company from the fact that a train may be behind the usual time." *Held*, also, that "the law does not impose the obligation upon a railway company to station persons at every crossing of a public road to warn travelers of approaching trains."

*Driving in covered wagon — Duty of traveler to look and listen.*

In *MARYLAND CENTRAL R. R. CO. v. NEUBEUR*, 62 Md. 391 (*April Term, 1884*), judgment for plaintiff for \$500 damages for injuries sustained by plaintiff by reason of a collision with one of defendant's engines, at a railroad crossing, while plaintiff was crossing track in a covered wagon, was reversed on ground of erroneous instruction on contributory negligence, which instruction failed to define with accuracy the relative duties and obligations of the parties, having proper regard to the nature of the accident and the facts of the case. . It was also *held* that in the absence of statutory requirement, there is no legal obligation on part of railroad company to keep at crossings of public country roads flagmen to warn travelers of passing of trains. *Held*, also, that travelers about to cross railroad tracks should look and listen for approaching trains, and failure of train to signal its approach will not excuse traveler from duty of exercising reasonable precaution.

*Backing horse and wagon near track — Collision with train*

In *PHILADELPHIA, WILMINGTON & BALTIMORE R. R. CO. v. STEBBING*, 62 Md. 573 (*October Term, 1884*), where plaintiff, a laborer on the town highway, had backed horse and wagon close to defendant's track, and was injured in collision between train and wagon, judgment for plaintiff for \$2,500 was reversed for erroneous instruction as to negligence of the parties.

*Collision at private crossing.*

In *PHILADELPHIA, WILMINGTON & BALTIMORE R. R. CO. v. FRONK*, 67 Md. 339 (*April Term, 1887*), it was held that "the failure to ring the bell or blow the whistle of a locomotive at a private crossing in the open country, guarded by gates on either side, where there was no station for passengers or freight, nor any side track, and where

no trains ever stopped; where for more than twenty years no whistle had ever been sounded, nor whistling post put up, nor any request therefor made by the owners of the property entitled to use the crossing; and where the line of the railroad on either side was nearly straight, is not evidence to go to the jury of culpable negligence on the part of a railroad company." In this case plaintiff was driving an empty two-horse wagon across the defendant's railroad tracks at a private crossing and was struck by an express train. Judgment for plaintiff reversed.

*Driving across track on dark night — Failure to look and listen — Negligence for jury.*

In *STATE (use of STEEVER) v. UNION R. R. CO. ET AL.*, 70 Md. 69 (*October Term, 1888*), judgment for defendant was reversed, the syllabus of the official report stating the case as follows: "In an action against a railroad company to recover damages for the killing of a person, it appeared that the deceased, a skilful driver, was driving along a turnpike towards a railroad crossing on a dark, rainy night, at a time when there was no reason to expect a train or engine; while crossing the track he was killed by an engine and tender going down grade at the rate of from twelve to fifteen miles an hour, no steam being used. The engine made no noise, and gave no signal of its approach and there was no light on it which could be seen; nor was any notice given to the deceased by the watchman at the crossing whose duty it was to give warning. If the deceased had stopped, looked and listened any number of times, there was nothing which could have been seen or heard. *Held*, that this evidence did not show negligence on the part of the deceased, and the case should not have been withdrawn from the jury."

See also subsequent decision in the *STEEVER CASE*, 72 Md. 153 (*January Term, 1890*), where defendant railroad company appealed from judgment rendered for plaintiff and judgment was reversed.

*Driving across electric railway track — Contributory negligence.*

In *LAKE ROLAND ELEVATED R'Y CO. v. MCKEWEN*, 80 Md. 593 (*March, 1895*), judgment for plaintiff for \$200 for injuries to person and property caused by negligence of defendant was affirmed, the syllabus of the official report stating: "Although the plaintiff in this case was guilty of contributory negligence in attempting to drive across the tracks of the defendant, an electric railway company, without slackening his speed and looking in both directions as soon as he was able to do so, in order to see if a car was approaching from either direction, yet, if the motorman of the car could

have seen that the plaintiff was about to cross in front in a position of danger, and could, by the exercise of reasonable care, have avoided the injury, then the defendant is liable."

*Collision with train while crossing track.*

In *WESTERN MARYLAND R. R. Co. v. KEHOE*, 83 Md. 434 (*June, 1896*), judgment for plaintiff for \$12,000, who was injured in collision with train while driving across defendant's track, was reversed for erroneous rulings on the question of negligence of the parties.

See subsequent decision in the *KEHOE CASE*, 86 Md. 43, 3 Am. Neg. Rep. 415 (*June, 1897*), in which verdict and judgment for plaintiff for \$11,000 was affirmed.

*Mules killed and vehicles destroyed in collision at private crossing.*

In *ANNAPOLIS & BALTIMORE SHORT LINE R. R. Co. v. PUMPHREY*, 71 Md. 82 (*January Term, 1890*), action to recover value of two mules, which were killed, and a cart, which was destroyed, in a collision with one of defendant's engines at a point where a private way or farm crossing intersected the railroad, judgment for plaintiff was reversed on ground of insufficient evidence of negligence on part of defendant to warrant submission of case to jury.

*Person riding horse injured by fright of animal at noise of steam from engine.*

*DUVALL v. BALTIMORE & OHIO R. R. Co.*, 73 Md. 516 (*January Term, 1891*), was an action for injuries sustained by plaintiff, who was thrown from her horse which she was riding by reason of the horse taking fright at the noise of steam emitted from defendant's engine at a railroad crossing. Judgment for defendant affirmed, it being held that it was not guilty of negligence.

## COOKE v. BALTIMORE TRACTION COMPANY.

*Court of Appeals, Maryland, March Term, 1895.*

[Reported in 80 Md. 551.]

**STREET AND STEAM RAILROADS — TRACK — NEGLIGENCE.** — There is no analogy between a case growing out of an injury caused by a street-railway car to a person rightfully upon the public thoroughfare and a case involving an injury inflicted by a steam-railroad train on a trespasser wrongfully upon the latter company's right of way.

**RECKLESS DRIVING OF STREET CAR — NEGLIGENCE.** — The reckless propulsion of a traction or electric car at full speed around the corners of streets in populous cities, without ascertaining that the track is clear, is an act of gross negligence.

**COLLISION BETWEEN STREET CAR AND VEHICLE — CONTRIBUTORY NEGLIGENCE.** — Where plaintiff, while driving at night upon defendant's

street-car track, after crossing the street where the track turned the corner, looked to see if a car was approaching and neither saw nor heard one, but about ten feet from the corner one of defendant's cars, running at full speed, without a headlight and giving no signal, turned the corner and crashed into plaintiff's buggy, it was *held* that such facts constituted sufficient evidence of defendant's negligence, and that plaintiff having made every reasonable effort to look and listen, his failure to see or hear the car approaching was not contributory negligence as matter of law, and it was error to direct verdict for defendant.

APPEAL from judgment for defendant in the Baltimore City Court. The facts appear in the opinion. *Judgment reversed.*

At the conclusion of the plaintiff's evidence, the trial court (WRIGHT, J.), instructed the jury that "though they should find the defendant guilty of negligence, yet the uncontradicted evidence shows that the accident happened by reason of the contributory negligence of the plaintiff, and their verdict must therefore be for the defendant." The Court of Appeals held this instruction to be reversible error.

WM. PINKNEY WHYTE, for appellant.

EDWARD DUFFY, for appellee.

**McSherry, J.** — This is another of the numerous negligence cases which have come before us from Baltimore city since the rapid transit system was introduced there. It is a case growing out of the alleged carelessness of the employees of the street-railway company, whereby the vehicle of the plaintiff, which was rightfully on a public street of Baltimore, was run into and demolished by a cable car belonging to and operated by the defendant company. The legal principles applicable to and governing such a case have been frequently and explicitly announced by this tribunal, but repeated efforts to invoke and rely on doctrines which have exclusive application to a totally different class of decisions render it necessary for us to briefly reiterate what was supposed to be thoroughly and definitely settled. There is, to begin with, no possible analogy between a case growing out of an injury caused by a street-railway car to a person rightfully upon the public thoroughfare and a case involving an injury inflicted by a steam-railroad train on a trespasser wrongfully upon the latter company's right of way. And this is so because the citizen has the same privilege to use the street for travel that the street-railway company has for propelling its cars thereon; and the railway company has, apart from its franchise to lay its rails, no right to the use of the street as a highway, superior in any

degree to that possessed by the humblest individual. The franchise to lay its rails upon the bed of a public street gives to the company no right to the exclusive use of that street, and in no respect exempts it from an imperative obligation to exercise due and proper care to avoid injuring persons who have an equal right to use the same thoroughfare. It is bound to take notice of, recognize, and respect the rights of every pedestrian or other traveler, and if, by adopting a motive power which has increased the speed of its cars, it has thereby increased, as common observation demonstrates, the risks and hazards of accidents to others, it must, as a reciprocal duty, enlarge, to a commensurate extent, the degree of vigilance and care necessary to avoid injuries which its own appliances have made more imminent. This is so self-evident and manifest that no argument is needed to support it. Negligence is essentially relative and comparative, not absolute. It is not even an object of simple apprehension apart from the circumstances out of which it grows. As these circumstances necessarily vary in their relations to each other under different surroundings, they inevitably change their original signification and import. Hence it is intrinsically true that those things which would not, under one condition, constitute negligence, would, on the other hand, under a different, though not necessarily an opposite, condition, most unequivocally indicate its existence. Thus an act which would have been neutral or indifferent when street cars were drawn by horses at a comparatively low rate of speed, and could consequently be readily brought to a stop as occasion required, would become culpably negligent since the change of motive power, and the great acceleration of speed incident thereto under the rapid transit system. The existence of negligence is, therefore, to be sought for in the facts and surroundings of each particular case. But there will generally be found standing prominently out in many instances of this character a disregard of the safety of others, a want of caution to avoid injury where the duty to use that caution is incumbent, and a reckless or heedless use of dangerous agencies in localities where the peril from their use is obvious. When these conditions, or any of them, are presented, and an injury is inflicted in consequence upon another, a case of actionable negligence has been made out, provided the plaintiff is himself free from contributing blame.

Now, the case before us, as presented by the plaintiff's



evidence, discloses the following facts: The defendant operates its street cars by a cable. Part of its route extends over portions of Fayette and Gilmor streets. At the intersection of these two streets the double tracks of the company curve sharply around the northeast corner. The right-hand track on Fayette street as you face the west is used by cars going west on that street and north on Gilmor street, and the left-hand track is used by cars going south on Gilmor and east on Fayette streets. The plaintiff, who is a physician, was returning, in his buggy, about a quarter before eleven on the night of the accident, from visiting a patient who lived on Gilmor street, south of Fayette. Driving to the northward on Gilmor street, he kept, as he ought to have done, on the right, or eastern, side. Before reaching Fayette street, which he was compelled to cross in order that he might continue on up Gilmor street, he saw a car coming south on Gilmor north of Fayette street, towards him. When it reached the point where the curve bending into Fayette street begins, it stopped. After he had passed the building line of Fayette street, he looked east, down Fayette street, to see if a car was approaching on the right-hand track, up that street, towards Gilmor street, and he neither saw nor heard one. The boy who was with him leaned out of the buggy, and also looked, with a like result. There were street lights burning on the corners of these streets. The plaintiff was driving at a speed of four or five miles an hour. From the time he emerged from behind the houses on Gilmor street and passed the building line of Fayette street, with their lights shining full upon him, he was clearly in a position where the gripman of the car going west on Fayette street had an unobstructed view of him; and the gripman either saw, or by the use of the slightest care could have seen, that the plaintiff was driving straight towards the track upon which the car was moving. Notwithstanding this, he rang no bell, gave no signal or warning, but swung his car around the curve into Gilmor street at full speed, without a headlight, and about ten feet north of the northeast corner crashed into the plaintiff's buggy, forcing it against the car standing on the opposite track, and shattered it into splinters. The gripman had ample time to check the speed of his car; and, if he saw that the plaintiff was driving to a place of peril, he was bound to stop, and avoid a collision otherwise inevitable. If he did not see the plaintiff, he was equally negligent in not stopping before sweeping

around the curve, because a proper regard for the safety of persons who might be rightfully on the east side of Gilmor street above Fayette, and who would therefore be beyond the reach of his vision by reason of the intervening buildings along the north side of Fayette street, imperatively required him to stop before venturing around the curve, and to ascertain that the track beyond or north of the corner was clear. There could scarcely be a more flagrant act of gross negligence than the reckless propulsion of a traction or electric car at full speed around the corners of streets in populous cities. To escape the consequences of such wanton carelessness, these companies should cause their cars to stop before turning such curves, and then to proceed under perfect control until the curve has been passed, and the straight track comes into unobstructed view. It is no answer to say that this would occasion the companies great inconvenience and delays. The safety of persons rightfully on the thoroughfares is not to be put in peril because a due regard for that safety will impose upon and exact from street-railway companies using dangerous agencies such additional inconveniences and delays. Upon the question, then, of the defendant's negligence, there was ample evidence to go to the jury. The Baltimore City Court, however, at the instance of the defendant, directed the jury to render a verdict for the defendant upon the ground that the accident happened by reason of the contributory negligence of the plaintiff. The verdict was so returned and recorded, and judgment was entered thereon in behalf of the defendant, and the plaintiff then took this appeal. The instruction thus granted is erroneous. It cannot be pretended that the plaintiff blindly drove into a perilous situation, or was careless as to his own safety. He and the boy who was with him looked down Fayette street, in the direction an approaching car would come, before driving over the tracks. That he saw and heard no car coming up that street is of itself no evidence of contributing negligence, because he made every reasonable effort to both look and listen for the approach of one; and herein the case at bar widely differs from Dyrenfurth's Case, 73 Md. 374 (1). His not seeing it,

1. *Contributory negligence in crossing* "an adult in full possession of his faculties, without stopping to look, attempted to cross a railroad track within from three to six feet of an approaching engine, which was running back-track—*The Dyrenfurth case*.—In *STATE (use of DYRENFURTH) v. BALTIMORE & OHIO R. R. CO.*, 73 Md. 374 (January Term, 1891), it appeared that

even though he did look for it, is quite a different thing from his not seeing it by reason of his failure to look at all. In the latter instance his failure to see it would have resulted from his omission to do that which it was his plain duty to do, viz., to look; whereas, in the first instance, his failure to see it might have resulted from one or more of many causes which involved no negligence on his part whatever. To say that a failure to see the car when he did look is, as an indication of negligence, equivalent to a failure to see it when he did not look, is to ignore the self-evident difference between an affirmative attempt to avoid an injury and a reckless indifference to the happening of one. He had a right to drive along the streets, and, after he had looked, and had seen no car approaching on Fayette street, he had the further right to cross the tracks, and to assume that he would not be recklessly run down. In exercising these rights he did precisely all that a cautious and prudent man would have done under the like conditions. This is all the evidence of contributing negligence which the record discloses, the defendant having adduced no evidence at all. There is no such distinct, prominent, and decisive fact proved, about which ordinary minds

ward at the rate of from ten to fifteen miles an hour, and was struck by the tender of the engine and killed. The deceased lived within a short distance of the place where the accident occurred, and its surroundings were well known to him. *Held*: 1st. That the deceased was guilty of contributory negligence as a matter of law, and a recovery could not be had against the railroad company. 2d. That conceding that the company was also guilty of negligence, this would not affect the case in the absence of evidence to show that the injury sustained was the direct consequence of such negligence." *Following* the ruling in *Baltimore & Ohio R. Co. v. Mali*, 66 Md. 53.

In the *DYRENFURTH* case, *supra*, the court said: "The decisive and controlling fact in this case," like the case of *STATE* (use of *HARVEY*) *v. BALTIMORE & OHIO R. R. Co.*, 69 Md. 339 (1888), "was the voluntary attempt of the deceased to cross the tracks in full view

of a moving engine and so near to it that no person of ordinary prudence would have made the attempt."

In the *HARVEY* case, *supra*, the plaintiff fell as she was passing over the track, sustaining injuries resulting in her death. Judgment for defendant was reversed for failure to instruct as to duty of railroad company to use every reasonable effort to avoid accident as soon as plaintiff's danger was discovered.

*The Mali case.* — In *BALTIMORE & OHIO R. R. Co. v. MALI*, 66 Md. 53 (April Term, 1886), it was held that a person who attempts to cross a railroad track, in view of an engine moving toward him, and not more than twelve feet from him, was guilty of contributory negligence as matter of law. Judgment for plaintiff for \$5,000 rendered in the Circuit Court, Baltimore county, reversed.

would not differ, as to justify the court in pronouncing the plaintiff's conduct such contributing negligence in law as would preclude him from recovering. Where the nature and attributes of the act relied on to show negligence contributing to the injury can only be correctly determined by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not for the court to determine its quality as matter of law. *Fitzpatrick's Case*, 35 Md. 32; *Dougherty's Case*, 36 Md. 366; *Miller's Case*, 29 Md. 252; *Cumberland Valley R. Co. v. Maugans*, 61 Md. 53, 3 Am. Neg. Cas. 648; *Van Steinburg's Case*, 17 Mich. 99. For the reasons we have given, we think this case, upon the plaintiff's showing, ought to have been submitted to the jury, and hence there was reversible error in withdrawing it from their consideration. The judgment will accordingly be reversed, and a new trial will be awarded.

Judgment reversed, with costs above and below, and a new trial awarded.

## BALTIMORE TRACTION COMPANY v. APPEL.

*Court of Appeals, Maryland, March Term, 1895.*

[Reported in 80 Md. 603.]

**COLLISION BETWEEN STREET CAR AND VEHICLE — CONTRIBUTORY NEGLIGENCE — INSTRUCTION.** — In an action to recover damages for injuries sustained by plaintiff who, while slowly driving across defendant's track, was struck by a street car which he first saw approaching a little more than three hundred feet away, it was held that an instruction was properly given where the court charged the jury that if plaintiff was guilty of want of reasonable and ordinary care in attempting to cross the tracks of defendant under the circumstances of the case then he was not entitled to recover unless the motorman could have avoided the accident by the use of ordinary care after he saw, or by the use of ordinary care might have seen, that plaintiff was on the track and in danger of being struck by the car.

*APPEAL from Superior Court, Baltimore City. Judgment for plaintiff affirmed.*

"The evidence showed that the plaintiff, driving east in a one-horse wagon, on an intersecting street, came to Charles street, where are the double tracks of the defendant, an electric-railway company. When his horse reached the first, or western track, plaintiff looked south and saw a car about 337 feet distant

coming north on the second or eastern track. Plaintiff kept on, and the car, continuing its course, struck the hind wheel of plaintiff's wagon, throwing him out and causing serious injury. When plaintiff's horse reached the second track, the car was distant about one hundred feet. The testimony on the part of the plaintiff was further to the effect that no bell was rung; that the motorman did not endeavor to stop the car, but that he could have done so, and that plaintiff was going at the rate of about three miles an hour. The defendant's evidence was that the motorman made every effort to stop the car when he saw that plaintiff was on the track and a collision imminent, that the gong was constantly rung and cries of warning uttered by the motorman, and that the plaintiff, just before the accident, was not looking in the direction of the car and had the reins hanging loosely down.

"The plaintiff offered five prayers. The first, to the effect that if the accident was caused by the negligence of the defendant's motorman, then the plaintiff is entitled to recover; the second, that the burden of establishing the contributory negligence of the plaintiff is on the defendant; the third, that if the motorman could have seen that the plaintiff did not hear or comprehend the signals given, then it was his duty to stop the car; the fourth, that even if the plaintiff was guilty of contributory negligence, yet he is entitled to recover if the motorman could have avoided the injury by the use of ordinary care, after he saw, or might have seen, that the plaintiff was in danger.

"The defendant offered twelve prayers. The first and third, to the effect that since the uncontradicted testimony showed that the accident was caused by the plaintiff's contributory negligence, the verdict must be for the defendant; the second, that there was no evidence of negligence on the part of the defendant; the fifth, that if the motorman did everything possible to stop the car when he saw that the plaintiff had put himself in a position of peril, the verdict must be for the defendant; the sixth, that the burden of proof to show negligence is on the plaintiff; the twelfth related to the imperfect condition of the car under the second count of the declaration; the eleventh, that if 'the jury shall find that the plaintiff drove across the tracks of the defendant in front of a moving car which he saw was coming with the rapidity and at the distance testified to by him, and was struck by the car; and if they shall further find that the

plaintiff did not watch the car, and that had the plaintiff watched the car he could have seen either that the motorman was not going to stop the car or could not stop the car in time to prevent a collision, and could have avoided a collision by whipping his horse or by the use of any diligence whatever, they are instructed that he was guilty of contributory negligence, and their verdict must be for the defendant; and there is no evidence to show that the plaintiff did whip his horse or use any diligence whatever.' The other prayers were to the effect that the act of the plaintiff in driving his wagon slowly in front of a rapidly moving car, which he plainly saw approaching, was such contributory negligence as to bar recovery, unless defendant failed to exercise reasonable care under the circumstances or was guilty of wanton neglect.

"The court below granted all the prayers offered by the plaintiff, except the third, which it rejected, and rejected all the prayers offered by the defendant, except the twelfth, which it granted, and in lieu of the defendant's rejected prayers the court granted the following instruction of its own:

" 'If the jury find that the plaintiff was guilty of the want of reasonable and ordinary care in attempting to cross the tracks of the defendant under the circumstances testified to, then he is not entitled to recover unless they believe from the evidence that the motorman could have avoided the accident by the use of ordinary care after he saw, or by the use of ordinary care might have seen, that the plaintiff was on the track and was in danger of being struck by the car.'

"After the argument of counsel before the jury, the defendant prayed the court to submit the following interrogatories to the jury, to be answered by them: I. Could the motorman of the defendant, after he discovered the peril of the plaintiff, have stopped his car in time to prevent the accident while the wagon of the plaintiff was crossing the track at the speed at which said wagon was going? II. Did the motorman use reasonable care to stop the car after he became aware of the plaintiff's peril? III. Could the motorman have stopped the car in time to avert the accident? IV. Could the plaintiff have averted the accident by the use of ordinary care?

"And the court refused to submit said interrogatories, and passed the following order thereon, viz:

" 'The court declines to submit the above interrogatories: 1st.

Because they are substantially covered by the instruction given; 2d. Because not having been submitted until the arguments to the jury have been concluded and the jury is about to retire, they are too late.'

"The defendant excepted to the refusal of the Court to submit said interrogatories to the jury, as well as to its action in granting the above-mentioned instructions and refusing the defendant's prayers. The jury returned a verdict for the plaintiff for \$700, and from the judgment thereon the defendant appealed."

EDWARD DUFFY, for appellant.

C. D. MCFARLAND, EMIL BUDNITZ and PETER J. CAMPBELL, for appellee.

**Briscoe, J.** — The appellee brought suit against the appellant, a street-railway company operating its lines in the city of Baltimore, for injuries sustained by reason of the negligence of one of its employees while propelling an electric car on the public streets of that city. The case was tried before a jury and, the judgment being for the plaintiff, the company has appealed. The questions arise solely upon exceptions to the rulings of the court upon the prayers and a construction of the Act of 1894, chapter 185, relating to "Special Findings of Facts by Court or Jury."

Upon the close of the plaintiff's testimony, the court was asked to withdraw the case from the jury; first, because of the contributing negligence of the plaintiff; and secondly, because there was no legally sufficient evidence to entitle the plaintiff to recover. And the failure of the court to so instruct the jury forms the basis of the first bill of exception. In refusing to grant these prayers or either of them, the court committed no error, because there was evidence, if the jury believed it, to entitle the plaintiff to recover.

The court having refused at this point of the case to take the case from the jury, the appellant offered its evidence, and the second exception embraces the rulings of the court at the close of the testimony upon the prayers of both plaintiff and defendant. There were seventeen prayers in all. The first, second, fourth and fifth prayers of the plaintiff were granted and the third rejected. All of the defendant's prayers were rejected except its twelfth, and the court granted in lieu of the rejected prayers an instruction of its own, which we will hereafter consider.

The first, second and fourth prayers of the plaintiff were properly granted, and have been approved in recent street-railway cases decided by this court. *Baltimore Traction Co. v. Wallace*, 77 Md. 435; *Central Railway Co. v. Coleman*, 80 Md. 328; *Arnreich's Case*, 78 Md. 589; *Cooke v. Baltimore Traction Co.*, 80 Md. 551 (1).

The fifth prayer related to the measure of damages in the event of a verdict for the plaintiff, and was not seriously controverted by the defendant.

By the first, second and third prayers of the defendant, which had been previously rejected, the question as to what constitutes contributory negligence, was sought again to be made one of law for the court rather than one of fact for the jury to determine, upon the facts of the case. This court has repeatedly decided that the question of negligence or the want of ordinary care where there was a contrariety of evidence in cases like the one here presented, is one of fact for the jury. This is the approved

1. *Pedestrians struck by street cars.* — In *BALTIMORE TRACTION CO. v. WALLACE*, 77 Md. 435 (*April Term, 1893*), it appeared that Charlotte Wallace, while crossing a track of the Baltimore Traction Co., was knocked down by one of its cars and sustained serious injuries. Judgment for plaintiff for \$750 affirmed.

In *NORTH BALTIMORE PASSENGER R'Y CO. v. ARNREICH*, 78 Md. 589 (*January Term, 1894*), it was held that "a pedestrian who, having first looked before him, and neither seeing nor hearing a car, started to cross a street, and was struck and injured by a horse car coming rapidly round a short curve, will not be precluded from recovering damages for the injuries he sustained, even though his own negligence contributed to the accident, if, by the exercise of reasonable care, the driver of the car could have avoided the consequence of such negligence." Judgment for plaintiff for \$5,500 affirmed.

In the *ARNREICH* case, *supra*, the court said: "This court has already held that notwithstanding the negligence of the plaintiff, if the defendant,

by the exercise of reasonable care, could have avoided the consequence of the neglect or carelessness of the plaintiff, the defendant is still liable. *Kean v. Balt. & Ohio R. R. Co.*, 61 Md. 154; *People's Passenger R'y Co. v. Green*, 56 Md. 84; *McMahon v. Northern Central R'y Co.*, 39 Md. 449; *Balt. Traction Co. v. Wallace*, 77 Md. 435."

See also *BALTIMORE CITY PASSENGER R'Y v. McDONNELL*, 43 Md. 534, a case in some respects closely analogous to the *ARNREICH* case, *supra*. The *McDonnell* case, however, was an action for injury to a child, about two years of age, who was run over by one of defendant's street cars. Judgment for plaintiff for \$4,000 affirmed.

In *CENTRAL R'Y CO. v. COLEMAN*, 80 Md. 328 (*December, 1894*), judgment for plaintiff (in action for injuries sustained by her while crossing street-car track) for \$300 was affirmed.

See *COOKE v. BALTIMORE TRACTION CO.*, 80 Md. 551, preceding case reported in this volume of AM. NEG. CAS.



doctrine both in England and this country, and we deem it unnecessary to refer again to the adjudicated cases bearing upon it. As already stated, these prayers, under the facts of this case, were properly rejected.

The prayer granted by the court in lieu of the other rejected prayers of the defendant fully and fairly covered the law of the case. It told the jury that if the plaintiff was guilty of the want of reasonable and ordinary care in attempting to cross the tracks of the defendant under the circumstances of this case, then he is not entitled to recover, unless the motorman could have avoided the accident by the use of ordinary care after he saw, or by the use of ordinary care might have seen, that the plaintiff was on the track, and was in danger of being struck by the car.

The third bill of exception involves an important question of practice under the Act of 1894, chapter 185, allowing in this State special findings of fact in all cases where issues of fact are submitted to court or jury. This act provides that: "In all cases where issues of fact are submitted to a jury the court may, at its own discretion, or shall, at the request of either party, require the jury, in addition to rendering a general verdict for the plaintiff or defendant, to find specially upon any particular questions of facts material to the issues on trial, which questions shall be in writing; and in all cases at law where issues of facts are tried before a court without a jury, the said court, at the written request of either party, find specially upon any question of fact which it may deem necessary to be determined in order to arrive at its verdict. All such special finding of facts, whether by the jury or by the court, shall be in writing, and must be filed with the clerk as part of the record of the case, and in civil cases, where a special finding of facts shall be inconsistent with the general verdict rendered at the same trial, the former shall control the latter and the court must give judgment accordingly; but nothing herein contained shall limit the court's power to grant a new trial or to arrest judgment on motion."

In the case before us, the court refused to submit the special questions, because they were too late, not having been requested until after the arguments had been concluded and the jury were about to retire. It will be observed that while the statute imperatively requires the court, at the request of either party, to instruct the jury, in addition to rendering a general verdict, to find specially upon particular questions of fact, material to the

issue, yet it nowhere prescribes the time when the request shall be made or when they shall be presented to the court. It is clear, then, that the law leaves it to the sound discretion of the trial court. The Supreme Court of Indiana so held in the case of *Kopelke v. Kopelke*, 112 Ind. 435, and reaffirmed in *Hartlep v. Cole*, 120 Ind. 253, in construing a similar statute. And to the same effect is *Thompson on Trials*, page 2021.

The better practice, we think, independent of any rule of court, would be to make the request at the time of the submission of the prayers; certainly not later. Manifestly it is too late after the close of the argument and the jury about to retire. The action of the court in rejecting the request in this case was not error.

Finding no reversible error in any of the rulings of the court upon either the prayers or special findings of fact, and as the case was properly submitted, we shall affirm the judgment. Judgment affirmed with costs.

**PEDESTRIAN KILLED WHILE CROSSING RAILROAD TRACK—FAILURE TO SIGNAL NOT NEGLIGENCE—DUTY OF TRAVELER TO LOOK AND LISTEN.**—In *NORTHERN CENTRAL RAILWAY CO. v. STATE (USE OF BURNS)*, 54 Md. 113 (*April Term, 1880*), action for negligent killing of Ella Burns, who was struck by defendant's train while crossing track, judgment for plaintiff was reversed, it being held that plaintiff failed to prove negligence of defendant. The syllabus in the official report is as follows:

"An action was brought under Art. 65 of the Code, by the State against a railroad company to recover damages resulting from the death of the mother of the children for whose use the action was brought. From the evidence at the trial, it appeared that there was no one who saw the infliction of the injuries from which deceased died, but as far as could be ascertained, there seemed to be no rational explanation of her injuries other than contact with some portion of a passing train of the defendant, and it was not controverted by the defendant that the injuries were so caused. The only evidence on the subject of a 'look-out' was that of the engineer and fireman of the train, which was uncontradicted and unimpeached. They proved that they were both engaged at the time in keeping a most careful and vigilant look-out and neither of them saw the deceased on or near the railway. *Held*: 1. That it could not be inferred from this fact that their testimony was not

true and might be disregarded by the jury unless it had been shown, which was not done, that the deceased was on the track in front of the train and was struck by the locomotive. 2. That if she came in contact with some other part of the train either in attempting to cross or getting too near the track after the locomotive had passed, she would not be seen by the engineer or fireman; and their failure to see her under such circumstances would be no ground for imputing negligence to them, as they were under no obligations to look back.

"The proof was that the crossing was not dangerous, and it was not usual to give signals by ringing the bell or sounding the whistle at that place. There did not appear to be any reason why such signals should be given, unless some one should be seen on or approaching the track. The train was in sight for the distance of two hundred yards, and the deceased could have seen it, if she had looked, time enough to have crossed in safety, or to have waited till it had passed. *Held*: 1. That it was impossible under the circumstances of the case to ascribe the accident exclusively to the failure to give signals of the approach of the train. 2. That before going upon the track or attempting to cross it, it was the duty of the deceased to look for an approaching train, and her failure to do so was negligence on her part. 3. That at the time and place when the accident occurred, there was no obligation on the part of the defendant to give signals of the approach of the train by sounding the whistle or ringing the bell, and negligence could not be imputed to it if they were not given. 4. That it was error to submit the case to the jury, there being no evidence of negligence on the part of the defendant." (Opinion delivered by BARTOL, Ch. J.)

#### NOTES OF MARYLAND CASES RELATING TO ACCIDENTS TO PEDESTRIANS AT CROSSINGS OR ON RAILROAD TRACKS.

In addition to the Maryland cases reported in this volume see the following relating to pedestrians struck by trains:

##### *Pedestrian struck by train — Burden of proof.*

In *BALTIMORE & OHIO R. R. CO. v. BAHRS*, 28 Md. 647 (*April Term, 1868*), action for personal injury sustained by plaintiff caused by negligent driving of one of defendant's cars along a public street, it was held that "in an action against a railroad company by one not a passenger, nor in the service of the company, to recover damages for an injury alleged to have been caused by the negligent and careless driving of a car of the defendants, by one of their agents

or servants, the plaintiff is not entitled to recover, if the defendants exercised ordinary care and diligence in the management of the car at the time of the accident; and the *onus* of proving the absence of such care and diligence is on the plaintiff." Judgment for plaintiff affirmed.

*Run over while crossing track — Degree of care required of railroad.*

In *BALTIMORE & OHIO R. R. CO. v. STATE* (use of MILLER), 29 Md. 252 (*April Term, 1868*), action for negligent killing of Miller, who was run over by one of defendant's trains while he was crossing track, judgment for plaintiff in the Superior Court of Baltimore City was reversed, for erroneous instructions as to care required of railroad company, the trial court charging that "the utmost care and diligence" was required.

*Run over by train.*

In *NORTHERN CENTRAL R'Y CO. v. STATE* (use of PRICE), 29 Md. 420 (*October Term, 1868*), action for negligent killing of Price, who was run over by defendant's train, judgment for plaintiff was affirmed.

In *BALTIMORE & OHIO R. R. CO. v. STATE* (use of DOUGHERTY), 36 Md. 366 (*April Term, 1872*), judgment for plaintiff for \$6,000 was affirmed. Dougherty was walking with a companion on a railroad track, away from a public crossing, when he was struck and killed by a train.

*Struck by train while crossing track — Contributory negligence.*

In *FRECH v. PHILADELPHIA, WILMINGTON & BALTIMORE R. R. CO.*, 39 Md. 574 (*October Term, 1873*), action by plaintiff for injuries sustained by being struck by train while crossing defendant's track, judgment for defendant was affirmed, the plaintiff being held to be guilty of contributory negligence. It was *held* that "when the employees in charge of a railway train have given all the usual and proper signals to warn persons of their approach they are not required to stop the train on discovering a person on the track, unless they have reason to believe that he is laboring under some disability, or that he does not hear or comprehend the signals."

*Laborer walking along track on way home killed by train.*

In *BALTIMORE & OHIO R. R. CO. v. STATE* (use of TRAINOR), 33 Md. 542 (*October Term, 1870*), judgment for plaintiff in Court of Common Pleas was affirmed, where deceased, an employee of the railroad company, was struck and fatally injured by a train as he was walking along track on his way home from work.

*Contributory negligence of person killed on track.*

In *BALTIMORE & POTOMAC R. R. Co. v. STATE* (use of STANSBURY), 54 Md. 648 (*October Term, 1880*), judgment for plaintiff was reversed on the ground of contributory negligence. "Where the uncontroverted evidence proved that the deceased (to recover damages for whose death the defendant was sued) was improperly on the track of the defendant, that he voluntarily exposed himself to the peril with full knowledge of the risk, and might, if he had used his eyes and ears, have seen and heard the approaching train long before it struck him, and the only material conflict of evidence was as to the giving of the signals upon the approach of the cars, it was held that the deceased having directly contributed to his own death, the plaintiff had no cause of action, and it was error to reject a prayer of the defendant to that effect."

In *STATE* (use of BACON) *v. BALTIMORE & POTOMAC R. R. Co.*, 58 Md. 482 (*April Term, 1882*), action for death of George Bacon, a colored man, who was struck and killed by one of defendant's engines while he was walking along the railroad track at night, judgment for defendant was affirmed on ground of contributory negligence of the deceased.

*Intoxicated person on track.*

In *KEAN v. BALTIMORE & OHIO R. R. Co.*, 61 Md. 154 (*October Term, 1883*), judgment for defendant was reversed for erroneous instructions by trial court on questions of negligence of parties. The court (per ALVEY, Ch. J.,) said: "If the plaintiff, who was injured by the alleged negligence of the railroad company, was in fact drunk, and failed to observe the reasonable precautions to avoid danger to himself while in the act of crossing the defendant's road tracks, or while upon the tracks of the road, though improperly there, and under circumstances to constitute negligence on his part, yet, if the defendant's servants in charge of the train, after discovering the perilous situation of the plaintiff, could, by the exercise of reasonable care and diligence, have avoided the accident, they were bound to do so. If they possessed knowledge of the plaintiff's situation, and failed to make proper and reasonable exertions whereby he could have been saved, the defendant would be liable, though it was by reason of the negligence or drunken condition of the plaintiff that he was found in the situation of danger. In such case their failure to use due care and exertion would constitute negligence which would form the direct and proximate cause of the injury. If, on the other hand, the plaintiff was on the crossing, or at any other place on the road tracks of the defendant, in such

condition as not to be able to take care of himself or paid no heed to the warnings of the approach of the train; or if from negligence, or reckless indifference to the perils of his situation, he failed to observe the precautions necessary to his safety and his situation was not known to those in charge of the train and while observing a careful lookout, was not discovered by them in time, by the use of reasonable care and diligence, to save him from injury, then his own want of care and reckless negligence in putting himself in such place of danger would deprive him of all ground of action against the defendant. And this would be the case though there may have been negligence on the part of the defendant in detaching the engine from the cars and allowing the latter to run down the switch by their own momentum, or by the force of the grade. In such case the negligence would be mutual or concurrent, and that of the plaintiff so directly contributing to the production of the accident as to preclude the right of recovery."

*Trespasser on track run over by train.*

IN BALTIMORE & OHIO R. R. CO. *v.* STATE (use of ALLISON), 62 Md. 479 (*April Term, 1884*), judgment for plaintiff for \$5,000 in action for death of person run over by defendant's train while walking on its right of way, was reversed. "Where a person trespassing upon a railroad right of way was run over by a train of cars and killed; and the place where the accident occurred, though within the corporate limits of the City of Baltimore, was not upon any street or public way where the person killed had a right to be, it was held that in the absence of other acts of negligence on the part of the agents of the railroad company the noncompliance with a city ordinance requiring that 'when a locomotive engine is used within the limits of the city a man shall be required to ride on the front of the locomotive engine when going forward and when going backwards on the tender not more than twelve inches from the bed of the road' did not *per se* amount of such omission of a general and imperative duty toward the deceased as would render the company liable in an action for damages resulting from his death."

*Woman struck by train while crossing track.*

IN BALTIMORE & OHIO R. R. CO. *v.* OWINGS, 65 Md. 502 (*April Term, 1886*), action for damages for injuries sustained by plaintiff's wife who while crossing defendant's railroad track was struck by one of defendant's trains, judgment for plaintiff for \$7,000 was affirmed. It was held that "the obligations, rights and duties of railroads and travelers, upon intersecting highways, are mutual and reciprocal, and no greater degree of care is required of one than the other. Both

parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side, is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty." *Held*, also, that "where a person is injured by a passing train in attempting to cross the track of a railroad by a footpath, a few feet distant from a public crossing, his right of recovery against the railroad company is the same as if he had used the public road; provided the danger from the cars would not have been less at the public road, and his precautions would not have been more availing."

*Person walking along track killed by train — Contributory negligence.*

In *STATE (use of RICKETTS) v. BALTIMORE & OHIO R. R. Co.* (*October Term, 1888*), 69 Md. 494, where a person walking on a railroad track in the open country, the road being straight and view unobstructed for nearly a mile was struck and killed by an engine running backward, it was *held* that verdict for defendant was properly directed, there being no evidence to show that defendant's employees knew of the presence of the deceased on the track until after the accident. Judgment for defendant affirmed.

*Person killed at crossing.*

In *BALTIMORE & OHIO R. R. Co. v. STATE (use of GOOD)*, 75 Md. 526 (*January Term, 1892*), action for negligent killing of a person by defendant's train at public crossing, judgment for plaintiff was reversed on the ground of insufficient evidence to support verdict.

*Person struck by falling object from train while walking along roadbed, but not on railroad right of way.*

In *HOWSER v. CUMBERLAND & PENNSYLVANIA R. R. Co.*, 80 Md. 146 (*December, 1894*), it was *held* that a presumption of negligence against defendant arose where "plaintiff, while walking in a footpath along the roadbed of the defendant, but not upon its right of way, was injured by half a dozen crossties which fell upon him from a gondola car attached to a train passing on defendant's road;" and judgment for defendant was reversed.

PERSON FOUND DEAD ON RAILROAD TRACK — PRESUMPTION — RAILROAD COMPANY NOT LIABLE. — In *STATE (USE OF BARNARD) v. PHILADELPHIA, WILMINGTON AND BALTIMORE R. R. CO.* (*Maryland, 1883*), 60 Md. 555, judgment for defendant in the Circuit Court, Cecil county, was affirmed, the facts being stated by IRVING, J., as follows: "The

facts are few, simple and uncontroverted. On the morning of December 15, 1881, the deceased was found dead upon a bridge of the appellee, built over Union street, in Havre de Grace. He lived at Perryville, on the other side of the Susquehanna River. He had been an agent of the railroad at that place for some years, but had been discharged some time before his death for intemperance. He was consequently perfectly familiar with the road and the localities around the place where he was found dead. He had been accustomed to walking across the bridge frequently by day and night; and at all times of the night. He was in Havre de Grace the night before his discovery on the bridge dead, and was drinking. He was last seen, near midnight, in the neighborhood of the ticket office, or station, and witness thought he was "pretty tight." He was advised not to attempt to walk across the bridge that night, but he insisted he would go home. When last seen he was at the proper passenger platform in front of station house. When found he was on the other side of the railroad track, between the south platform and the railroad track. He was caught between two cross-ties, outside the railroad track, and between it and the platform, on that side. He had slipped down as far as his hips. His body was bent forward toward Perryville, his breast on one crosstie and his head on the one next beyond. One shoe and stocking were off, and with his hat, and flask of whiskey (which was still corked) were found in the street below. His neck was broken, and there was a wound on the back of his head, and one on his left shoulder; and his shins were bruised. The deceased had one lame foot, which was painful, upon which he wore a large and untied shoe. He said of that foot, that if he "took his shoe off and let the fresh air strike it," it was not so painful. How he came where he was, or in the condition in which he was, no one knew. It was unexplained. Nobody had seen him go there or saw him there till he was found dead. The theory of the plaintiff was that he went there to board the train to cross the river; and because the bridge was uncovered he fell between the crossties, and was struck by a train and killed. That is bare presumption. The officers of no train saw him. There seems to be no greater warrant for that presumption than that he was walking the bridge to his home and fell in as he was found; or sat down in a besotted condition to cool his foot, and was killed. There is certainly no evidence on the subject. It was a bad night. It was raining and sleeting. This bridge was a continuation of the bridge over the river. Crossing from Perryville the bridge connects with a high bank at Havre de Grace, which it reaches by crossing Union street



nearly at right angles, and above grade to the height of fifteen feet above the street. The station house at Havre de Grace is at the end of the bridge and on the north side of it. On this side, along the track, in front of station house, extending for several hundred feet is a platform for passengers to get off and on trains going in either direction. On the south side, there is a platform also, on the bridge, on which passengers have sometimes alighted from trains going south and occasionally boarded going south; but which is not convenient, because of the necessary position of passenger coaches, for boarding cars going north; and which was seldom used by any one going north; and it does not appear in the proof it was held out by the company as a platform for that purpose. It seems to have been used mainly for freight. The evidence shows that passenger coaches overlap this platform several inches. Beyond the covering of the platforms, there is no plank on the crossties or sills of the bridge, but the spaces between are open. But by reason of the overlapping of the coaches there is no chance of a person on the platform getting into these spaces except perhaps between the coupling space between two cars. All the counts in the *narr.*, charge the negligence to consist in leaving these crossties unplanked; and the plaintiffs have insisted that Barnard was at the place where he was found for the purpose of boarding the train and in the attempt fell and was killed by the train by reason of this neglect. Of this we have seen there was no proof, but it rests wholly in assumption. We have been cited to no provision of the defendant's charter obliging them to construct the bridge in a particular way which has been violated. There has been nothing introduced to show that this bridge, which was for railroad uses, was required to be made safe for people to walk over. There is no evidence that this bridge is not constructed in the usual way that railroad bridges are built, and that it was not well and safely constructed as and for such a bridge. The bridge is private property and we have been cited no law appropriating any part of it to use as a public highway for any other purpose than transit on the cars. The whole case rested in conjecture and there was no case made for the jury. The cases in this State are numerous which decide that the *onus* of proving the negligence which occasions the injury sued for is on the plaintiff; and that there is no presumption of negligence. *Bahr's Case*, 28 Md. 647; *Foy's Case*, 47 Md. 76; *State, use of Miller v. Balt. & O. R. R.*, 58 Md. 222; *Bacon's Case*, 58 Md. 484, &c.''(1) Judgment affirmed.

1. See notes and abstracts of the with the Maryland cases in this volume. cases cited in the case at bar, reported ume.

BOY RUN OVER AND KILLED BY TRAIN — TRESPASSER — RAILROAD NOT LIABLE. — In *STATE (USE OF MILLER) v. BALTIMORE & OHIO RAILROAD CO. (Maryland, 1881)*, 58 Md. 221, judgment for defendant in Circuit Court, Washington county, was affirmed, the court (per BARTOL, Ch. J.) stating the case as follows: "This suit was instituted by the appellant to recover damages for causing the death of Douglas Miller, a youth about sixteen years of age, who was killed by being run over by the cars of the appellee. The accident occurred at Keedysville, a station on the Washington county branch of the appellee's road, on the 1st day of March, 1878, at seven o'clock in the morning. Keedysville is a small village situated on the Boonsborough and Sharpsburg Turnpike, which forms the main street of the town, and crosses the railroad at right angles near the station. At that place there is a siding parallel to the main track and connected therewith at the distance of about nine feet from it, and extending from a point 250 yards above the turnpike to a short distance below it. On the morning of the accident a freight train, with a passenger car attached, reached and stopped at the station at the regular time. The engine was detached and ran forward up to the switch connected with the siding, then ran down the siding and hooked to four coal cars standing thereon; the two nearest the station and farthest from the engine had been unloaded, one of the others had been partly unloaded, while the fourth was loaded with coal. The engine drew the four cars up the siding in order to take the two empty cars out upon the main track, where they were detached and sent down the main track towards the place where the train was standing at the platform, and the two loaded cars were sent down the siding where they had been before. It appears from the testimony that the deceased was seen upon the empty cars on the main track "breaking them," he was also seen whilst he was getting down from those cars after they had stopped, and shortly afterwards, his body was found under the rear end of the loaded cars on the siding, mortally injured. It appeared from the indications upon the side track that his body had been dragged underneath the cars about thirty-five feet; and on the platform at the foremost end of one of the cars, which was covered with white frost, 'there were marks resembling finger prints as if some one had slipped.' No witness saw the deceased after he got off the empty cars, till his body was found under the cars as before stated. There is no testimony in the case showing in what manner he got under the cars. Whether he was attempting to get on them while in motion, or fell while attempting to cross the track, or in what

way the accident happened, is not explained by the evidence. According to the proof, the loaded cars were moving very slowly, at the rate of one mile an hour.

"At the trial below a number of prayers offered by the appellant were rejected, and a verdict was found for the appellee, the jury being instructed by the court that 'under the pleadings and evidence in the case, the plaintiff was not entitled to recover.' In our opinion the instruction was clearly right. As said in Foy's Case, 47 Md. 76, 82: 'In order to maintain the action it was incumbent on the plaintiff to prove that the death was caused by the negligence of the defendant's agents, and it must not appear from the evidence that want of ordinary care and prudence on the part of the deceased contributed to cause his death.'"

"The burden is upon the plaintiff in the first instance to prove negligence or want of ordinary care on the part of defendant's agents causing the accident. Frech's Case, 39 Md. 574; Burn's Case, 54 Md. 113. After carefully considering all the facts of this case, as they appear in the record, we can perceive no ground upon which any negligence or want of ordinary care can be imputed to the appellee.

"In the argument, on the part of the appellant, it was insisted that it was negligence to suffer the loaded cars to run upon the siding without having a brakeman upon them. With respect to this question, it must be observed that no positive testimony was given that there was not a brakeman on the cars while they were in motion. Harrison, the engineer, testified positively that Watkins, the brakeman, was then upon the cars, and both he and Shubridge, the fireman, testified that at the moment they heard of the accident, after the cars had stopped, they saw Watkins between the two tracks alongside of the loaded cars going towards the forepart of the cars. Watkins had died before the trial, and we are consequently without his evidence. On the part of the appellant, three witnesses testified that they saw no brakeman on the cars; but none of them saw the cars while in motion, they testified only that they saw no brakeman on them, after they had stopped, and the accident had happened, which is not inconsistent with the positive testimony of Harrison. But assuming that there was some evidence, that the loaded cars had no brakeman on them, that fact would be no ground for charging the appellee with culpable negligence. The place where the accident happened was not at a street or highway, or a crossing place. The appellee was entitled to a clear unobstructed track, and could not presume that any one would intrude thereon; there is no evidence whatever that the deceased had any right to

go upon the track. He was not in the employ of the appellee, and no part of his duty as the employee of Mr. Keedy required him to expose himself in that place of danger. Under the proof in this case, there is no ground for holding the appellee responsible for his death.

"In addition to the cases in our own reports cited by the appellee, we refer to *Phila. & Reading R. R. Co. v. Hummel*, 8 Wright (Pa.) 375, and *Hallihan v. R. R. Co.* 71 Mo. 113, as applicable to the present case." Judgment affirmed.

#### CHILDREN INJURED ON RAILROAD TRACKS.

Among other Maryland cases relating to injuries to children while crossing railroad tracks are the following:

##### *Cars standing on street — Children crossing between cars.*

In *BALTIMORE & OHIO R. R. Co. v. FITZPATRICK*, and *FITZPATRICK v. BALTIMORE & OHIO R. R. Co.*, 35 Md. 32 (*October Term, 1871*), there were cross-appeals from the Court of Common Pleas, plaintiff and defendant excepting to rulings of court, but judgment for plaintiff for \$8,000 was affirmed. It appeared that plaintiff, a boy about thirteen years of age at the time of the accident, attempted to cross between cars standing on street in front of his father's door, there being a space of about five feet between the cars, but while so crossing the cars were suddenly moved without warning and plaintiff was severely injured in the collision between the cars.

See also *McMAHON v. NORTHERN CENTRAL R'y Co.*, 39 Md. 438 (*October Term, 1873*), where child about six years of age was run over by freight cars which had been left standing on street for a considerable time. Judgment for defendant reversed for erroneous charge of trial court on the question of negligence.

##### *Child run over on street-car track.*

In *BALTIMORE CITY PASSENGER R'y Co. v. McDONNELL*, 43 Md. 534 (*October Term, 1875*), judgment for plaintiff for \$4,000 was affirmed. Plaintiff, a child about two years of age, was run over by defendant's street car which was alleged to be running at a speed greater than permitted by city ordinance. It was held "that the defendant was guilty of negligence, if the accident could have been avoided had the car not been running at a prohibited rate of speed." It was also held that "in a large populous city where all descriptions of vehicles are constantly passing and repassing, as well as persons on foot, including the aged and infirm, and children who are young and wanting in prudence and discretion, it is the duty of drivers of cars not only to see that the railroad track is clear, but also to exercise a constant watchfulness for persons who may be approaching the track."

##### *Child killed by train — Trespassing on track.*

In *BALTIMORE & OHIO R. R. Co. v. STATE* (use of *SAVINGTON*), 71 Md. 590 (*October Term, 1889*), judgment, in action for death of boy about eleven years old who was killed by a passenger train of defendant's while he was unlawfully on the railroad track, was reversed on the ground of insufficient evidence to submit case to the jury.

## WORTHEN v. GRAND TRUNK RAILWAY COMPANY.

*Supreme Judicial Court, Massachusetts, July, 1878.*

[Reported in 125 Mass. 99.]

**PASSENGER STANDING IN AISLE OF CAR INJURED IN COLLISION — QUESTION FOR JURY.** — Where it appeared that a passenger, as the train approached the station where he was to get out, stood in the aisle of the car within a step or two of the open door and the train, instead of being stopped where it ought to have stopped, went forward with great velocity and collided with another train on the same track, and the passenger was thrown on the front platform and was injured by the rear platform of the forward car being driven over the platform that he was on, the question of reasonable care on the part of the passenger was properly left to the jury (1).

**EVIDENCE — SPEED OF TRAIN.** — Where there was evidence introduced that the train had been running at an unusual rate of speed and had been racing with another train on a parallel track it was error not to allow the conductor of the train to testify that the train was running at the usual rate of speed.

**ON EXCEPTIONS** by defendant to verdict rendered for plaintiff for \$18,335. *Exceptions sustained.*

"Tort against a common carrier for personal injuries occasioned to a passenger by the alleged negligence of the defendant. Answer: 1. A general denial. 2. That the plaintiff was not in

1. *Passengers injured in collision or on railroad track.* — For other Massachusetts cases relating to injuries to passengers caused by collisions or being struck by cars on track, see vol. 3 AM. NEG. CAS. (alighting and boarding cases) in which *Bancroft v. Boston & Worcester R. R. Corp.*, 97 Mass. 275, 3 Am. Neg. Cas. 765; *Mayo v. Boston & Maine R. R.*, 104 Mass. 137, 3 Am. Neg. Cas. 773, and *Johnson v. Boston & Maine R. R.*, 125 Mass. 75, 3 Am. Neg. Cas. 791 (cases relating to passengers injured while crossing track at station), are reported; and see also vol. 9, AM. NEG. CAS. (accidents on trains and at stations, etc.) in which *Hickey v. Boston & Lowell R. R. Co.*, 96 Mass. 429, 9 Am. Neg. Cas. 454; *Barden v. Boston, Clinton & F. R. R. Co.*, 121 Mass. 426, 9 Am. Neg. Cas. 458; *Stewart v. Bos-*

*ton & Providence R. R. Co.*, 146 Mass. 605, 9 Am. Neg. Cas. 459, and *De v. Boston & Maine R. R. Co.*, Mass. 343, 9 Am. Neg. Cas. 460 (passengers injured in collision), are reported together with collision cases decided in other states.

See also at end of this case, Notes on Massachusetts cases relating to passengers injured in collisions or at crossings.

*Collisions and crossings.* — See also following Notes in the series of Neg. Rep., viz., *Collisions on Railroads, either between Trains or Trains with Animals, by which Passengers are Injured*, 8 Am. Neg. Rep. 166; *Collisions on Street Railroads, in which Passengers are Injured*, Neg. Rep. 322-327.

exercise of due care. Trial in this court, before LORD, J., who allowed a bill of exceptions in substance as follows:

"The plaintiff was injured by the collision of an express train on the defendant's road, in which he was riding, with an accommodation train standing on the same track, at the depot at Detroit Junction in Michigan, at which depot the train on which he was riding was to stop, and he was to change cars.

"The plaintiff testified that the train, on which he was, was running at an unusual speed, much faster than he had been accustomed to ride on the defendant's road; that it did not stop at a crossing of the Bay City road, three miles distant from Detroit Junction; that from the Milwaukee Junction, five miles distant from the Detroit Junction, the train was racing with a train on the Michigan Southern road, which was parallel with the defendant's road, and was in sight all the way; that, as they approached the Detroit Junction, and within one or two miles of it, the conductor took up the plaintiff's ticket and said to him, 'You will change cars at the next stopping place;' that, the front door of the car being open, he went out upon the front platform of the car and looked to see how near they were to the junction, and looked at the trains racing, returned into the car and got his baggage ready, and placed it on the front seat, on which he had been sitting, ready to be taken up when the train should stop; that he stood beside his seat, within a step or so of the door, with his hand holding either on the knob of the door or on the edge of the door, which still remained open; that the cars, instead of stopping at the point where they ought to have stopped, went forward with great velocity and came into collision with a train standing on the track; that the shock of the collision was so great as to throw him out on the platform, and, holding on to the door, he was thrown around so as to bring his back next to the window, at the same time that the platform of the smoking car ahead of him was driven over the platform of the car on which he was thrown, and, the railings of the cars being forced against him, forced him through the window and caused the injuries complained of.

"The engine driver testified that the Smith patent steam-vacuum brake, which was used on the train, failed to work so as to stop the train before it struck the other train; that the train had been examined at Port Huron, sixty miles distant; that this steam-vacuum brake was an approved brake, and worked at every

other station, stopping the train promptly; that at the Bay City road crossing the cars came to a full stop; that when the patent air-brake did not work, he sounded the whistle for down brakes, which were applied, and the engine reversed; that the train was not racing with the train on the Michigan Southern road; and that the express train usually followed the accommodation train, which it struck, into the station at an interval of ten minutes after the accommodation train got there, to give it time to change passengers and baggage, and go forward.

" There was evidence tending to show, on the part of the plaintiff, that the train was running at an unusual speed when it came to the station; that the rules of the road in regard to signals had not been followed; and that the rubber hose of the steam-vacuum brake was not in order; all of which evidence, which was controverted by the defendant, was submitted to the jury on the question of negligence.

" The defendant then proposed to ask the conductor whether the train was running at the usual speed at this point, as it approached Detroit Junction, in order to show that it was running at the usual speed, the witness having already testified what that speed was. The plaintiff objected to his testifying whether it was the usual speed, on the ground that, for aught that appeared, the defendant usually ran its train at an improper speed. The judge ruled that the defendant could not show that it was running the train at the usual speed, unless it also undertook to show that such usual speed was a safe and proper rate of speed, such as was usual upon well-conducted railroads; and the defendant excepted.

" Among other instructions, to which no exceptions were taken, the judge instructed the jury that if the plaintiff, at the time of the injury, was not exercising reasonable care and caution, and the want of such reasonable care and caution caused, or contributed to cause, the injury, he was not entitled to recover; and that, as a matter of law, it would not be reasonable care and caution to stand upon the platform of a running car.

" The defendant further requested the judge to instruct the jury that it is not, as a matter of law, reasonable care and caution to stand in the open door of a moving car, or to stand so near an open doorway of a moving car, as to be thrown upon the platform. This instruction the judge declined to give, but instructed the jury that if the plaintiff was standing inside of the car before

the open doorway, it was a question for them to say whether a man in that position was in the exercise of reasonable and proper care, and that they must be reasonably satisfied, taking all the evidence together, that he was at the time within the car, and was in the exercise of that reasonable care which his situation, at that particular time, and those circumstances required of him.

"The jury returned a verdict for the plaintiff for \$18,335; and the defendant alleged exceptions."

J. RAND (of Maine) & R. D. SMITH, for defendant.

E. L. BARNEY, for plaintiff.

**Morton, J.**—The plaintiff was injured by a collision at the depot at Detroit Junction. He testified that the train in which he was riding was running at an unusual rate of speed, and that for five miles before it reached Detroit Junction it was "racing with a train on the Michigan Southern road, which was parallel with the defendant's road and was in sight all the way." We are of opinion that the question proposed by the defendant to its conductor, whether the train was running at the usual speed at this point, should not have been excluded. It is true that the fact that the defendant was running at the usual rate of speed would not be a defense, unless it appeared that such rate was a safe and proper rate of speed; but the testimony excluded would contradict the plaintiff's testimony, and would tend strongly to show that the train was not racing with the train on the parallel road. It thus bore upon a question which would undoubtedly be influential with the jury in deciding the issue of the defendant's negligence.

We see no ground of objection to the other rulings at the trial. The question, whether the plaintiff was using due care, was a question for the jury, and was submitted to them with instructions which were sufficiently favorable to the defendant.

Exceptions sustained.

#### NOTES OF MASSACHUSETTS CASES RELATING TO PASSENGERS INJURED IN COLLISIONS OR AT CROSSINGS.

In addition to the cases reported in vol. 9 AM. NEG. CAS., relating to injuries to passengers, see the following Massachusetts cases:

*Passenger on train struck by gate at crossing.*

In **TYRELL v. EASTERN R. R. CO.**, 111 Mass. 546 (1873), tort to recover for injuries to plaintiff, while a passenger on defendant's



railroad, by reason of a gate or pole maintained by defendants at a highway crossing, being thrown against the car in which plaintiff was seated and striking him, it was held that whether such gate was properly constructed as to be reasonably safe was a question of fact for jury.

*Passenger leaving train and crossing track struck by train.*

In *JOHNSON v. BOSTON & MAINE R. R. CO.*, 125 Mass. 75 (1878), it was held that where plaintiff left train and afterwards, while on way to station of another railroad to meet his son, is injured while crossing track, where he might have crossed at a highway crossing, he was a trespasser and could not, in absence of wilful negligence, recover for the injury sustained. Judgment on verdict for defendant.

*Passenger standing on platform of car injured in collision.*

In *COMMONWEALTH v. BOSTON & LOWELL R. R. CORP.*, 134 Mass. 211 (*January, 1883*), an indictment on the statute of 1874, c. 372, § 163, for causing the death of Daniel Driscoll on May 3, 1881, while a passenger on defendant's train, it appeared, at the trial in the Superior Court, before BRIGHAM, Ch. J., that Driscoll was a passenger on defendant's road at the time named in the indictment, and, although there was room for him to stand within the cars, he was standing on the front platform of the first passenger car, when the train, through the negligence of an employee of the defendant, in misplacing a switch, left the main track, and ran into a train of cars standing on a side track; that Driscoll was crushed between the tender of the locomotive engine and the platform of the car on which he had been standing; and that no one else on the train of cars was injured. These facts not being in dispute, defendant asked the judge to rule that the indictment could not be maintained. The judge refused so to rule, and instructed the jury as follows: "It being admitted that carelessness or neglect of the defendant's agent or servant caused a collision of cars, upon which Driscoll was riding as a passenger, and that this collision caused the death of said Driscoll, the jury, for the purposes of this trial, are instructed, that no question of due care on the part of said Driscoll arises in this case, and that — notwithstanding said Driscoll, at the time of said collision, was standing on the platform of the car upon which he was a passenger, having gone and remained there voluntarily, when there was room to stand within said car — upon the undisputed facts, the jury will be warranted in finding that the allegations of the indictment are proved beyond a reasonable

doubt, and in returning a verdict of guilty against the defendant." The jury returned a verdict of guilty; and defendant alleged exceptions. The court (per COLBURN, J.) discussed the only question presented in the case, whether, at a trial under an indictment for causing the death of a passenger, based upon the provisions of the statute of 1874, c. 372, § 163, the want of due care on the part of the passenger killed is a defense to such indictment, and rendered judgment on the verdict.

*Passenger injured in collision — Flying switch.*

In *WHITE v. FITCHBURG R. R. CO.*, 136 Mass. 321 (1884), passenger injured in collision between trains caused by one of the trains making a "flying switch," judgment was rendered for plaintiff on verdict for \$7,500.

*Passenger standing near edge of station platform struck by train — Failure to signal.*

In *SONIER v. BOSTON & ALBANY R. R. CO.*, 141 Mass. 10 (1886), person who had purchased ticket for passage on a train struck by another train as he was standing upon and near edge of station platform, verdict for plaintiff was sustained, the defendant having failed to ring bell on engine, which omission was cause of accident.

## MARKS v. FITCHBURG RAILROAD COMPANY.

*Supreme Judicial Court, Massachusetts, February Term, 1892.*

[Reported in 155 Mass. 493].

**COLLISION AT CROSSING—HORSE FRIGHTENED AT NOISE OF TRAIN — PERSON RIDING IN WAGON INJURED — GATES AT CROSSING — DUTY OF RAILROAD COMPANY — QUESTION FOR JURY.** — In an action of tort to recover for personal injuries to plaintiff's intestate caused by a collision at a grade crossing, an ice wagon in which he was riding being struck by defendant's train, it appeared that the gates of the crossing were lowered on the approach of a fast train, that the horses while standing close to the gates became frightened at the noise of the train, plunged forward, breaking down the gates, and ran upon the tracks; that the wagon was struck by the train and plaintiff's intestate was thrown out, receiving injuries from which he shortly afterwards died. A verdict was directed for defendant. *Held*, that it was a question for the jury whether the railroad company should not, for the protection of travelers, have a different kind of gate to keep frightened horses from pushing upon the

tracks, and whether the company did not fail to exercise such care to have been exercised for the protection of persons using the place as a dangerous place (1).

TORT, for personal injuries occasioned to David L. M. plaintiff's intestate, by a collision at a crossing at grade of way by the defendant's railroad, in that part of Boston Charlestown. Trial in the Superior Court, before DUNN who allowed a bill of exceptions, in substance as follows:

"The evidence tended to prove the following facts: The defendant's railroad at the crossing in question runs from west, and is crossed by Austin street nearly at a right angle. Austin street, at a short distance to the south, declared the witness to be not more than sixteen or seventeen feet from the crossing. The crossing was crossed at grade the tracks of the Boston and Maine Railroad. Each of these crossings was protected by gates. The gates were of the kind in common use, being in two sections operated by mechanism which raised and depressed the sections simultaneously. Each section consisted of two strips of board pivoted to a post at the curbstone, and extending to the centre of the street, and was counterbalanced at the outside end. The end of each section, which reached the center of the street when placed in a horizontal position, was supported vertically by iron rods attached to the end of the section, which dropped to the ground when the section was raised. The crossing was planked in the usual manner between the curbs to the width of the street. Austin street at the crossing was about thirty feet wide, from curb to curb. On or about

1. *Horse frightened by noise of train — Defective bridge.*—In *TITCOMB v. FITCH-BURG R. R. Co.* and *WHITE v. FITCH-BURG R. R. Co.*, 12 Allen, 254 (1866) two actions of tort sustained by plaintiffs by reason of defective bridge over defendant's railroad where same was crossed by a highway, it appeared that while plaintiffs were driving upon a bridge over the railroad a train came along and the horse becoming frightened by noise of same rushed upon the bridge fence and the horse, carriage and occupants were all precipitated down the bank, the plaintiffs being injured, the horse killed and carriage broken. Held, that defendant liable for the injury caused by the defective bridge, and judgment for \$1,250 in the Titcomb action and \$2,000 in the White action was rendered on the merits.

*Horse frightened by noise of electric street car.*—In *BELLEVILLE v. HOLYOKE STREET R'y Co.*, 121 Mass. 1 (1893) woman driving injured by becoming frightened at noise of gong on electric car, action of plaintiff was sustained and bill of exceptions overruled.

1888, the plaintiff's intestate was employed as a helper to the driver of an ice cart. About seven o'clock in the morning the cart, loaded with ice and drawn by two horses, was approaching these crossings from the south on its way to Charlestown, the intestate sitting with the driver. When the team was on the Boston and Maine crossing the gates began to go down on the Fitchburg crossing, and the driver stopped the horses, which were going at a walk a few feet from the Fitchburg crossing, and with the cart just clear of the Boston and Maine crossing. The gates at the Boston and Maine crossing were then lowered, and the driver was then told by the gateman at that crossing not to back the team. The view of the tracks of the Fitchburg Railroad to the west from the crossing was cut off from one approaching it from the south by a roundhouse and water tank, until the Boston and Maine crossing was reached. The lowering of the gates at the Fitchburg crossing was the first warning the driver had that a train was approaching. As the horses stood quietly with the cart between the crossings, the train rapidly approached on the Fitchburg Railroad from the west. The horses were frightened at the noise of this train, and plunged on to the gates, and, breaking them down, ran upon the tracks in front of the engine. The cart was struck, and the intestate was thrown from the driver's seat, and seriously injured, dying shortly afterwards.

"Upon this evidence, the judge ruled that the plaintiff could not maintain the action, and ordered a verdict for the defendant; and the plaintiff alleged exceptions. The case was argued at the bar in November, 1891, and afterwards was submitted on the briefs to all the judges except LATHROP, J." *Exceptions sustained.*

H. W. BRAGG & R. BRADFORD, for plaintiff.

G. A. TORREY, for defendant.

**Knowlton, J.** — The defendant's railroad crosses Austin street, in Charlestown, at grade, and, very near it — one witness said at a distance from its tracks of not more than sixteen or seventeen feet — the tracks of the Boston & Maine Railroad cross the same street. The plaintiff's intestate was struck by a locomotive engine at the crossing, and died soon after from the injury so received. The jury might well have found from the evidence that he, and the driver with whom he was riding, were both in the exercise of due care. There was evidence that one approaching the crossing, as the plaintiff's intestate was, cannot see a train coming on the

defendant's railroad until he gets very near the tracks, the Eastern roundhouse and the tank cut off the view testimony was that the driver of the ice cart had no way to see the approaching train until he was on the tracks of the Boston & Maine Railroad, and within a few feet of the defective tracks. He was ordered by the gateman of the Boston & Maine Railroad not to back his team, probably because of danger from the approach of a train on that road. The gates of the defective road were shut down before him, and the defendant's team was stopped approaching so that he could not go on, and the tracks of the Boston & Maine Railroad were behind him, so that he could not go back, and he was obliged to stay there, shut in on both sides, with his horses' heads only a few feet from a track on which a train was rapidly approaching. It is a matter of common knowledge that many horses which are reasonably safe and sound to be used will not stand quietly and let a train approach them as did the train to these two horses attached to the ice cart. Unless his horses were unusually fearless, a driver as cautious as this driver was would have good reason to expect an accident. There was evidence that the train was running at the rate of twenty miles an hour. If the driver had been warned of the coming train before he reached the tracks of the Boston & Maine Railroad, or if the warning had been given long enough before the arrival of the train to enable him to cross over if he was on the railroad, the accident might not have happened. The gates were made of narrow strips of board, and were not of sufficient strength to be of service in stopping horses if they ran against them. Ordinarily, the principal purpose of gates is to effectually warn travelers not to cross, but there may be cases in which the gate should be a strong barrier that will help to stop horses off the tracks. If, in the proper management of the defendant's business at this crossing, persons driving teams exercise of due care are likely to find themselves shut in between the defendant's tracks and the tracks of the Boston & Maine Railroad when trains are passing, it is a question for the jury whether the defendant should not, for the protection of his customers, have a different kind of gate, to keep frightened horses from pushing upon the tracks. The rate of speed at which trains should be permitted to approach the crossing, the length of time before the passage of a train that warning should be given to travelers on the street, in view of the close proximity of

of other railroads, the kind of warning that should be given, and the kind of gates or barriers that should be used, all enter into the determination of the question how the defendant's business at this place should be managed, to prevent accidents of this kind when travelers are in the exercise of proper care. We are of opinion that it was a question of fact for the jury whether, in some of these particulars, the defendant did not fail to exercise such care as ought to have been exercised for the protection of persons using the highway at this very dangerous place. *Titcomb v. Fitchburg R. Co.*, 12 Allen, 254; *Tyrrell v. Eastern R. Co.*, 111 Mass. 546.

Exceptions sustained.

## CLARK v. BOSTON AND MAINE RAILROAD.

*Supreme Judicial Court, Massachusetts, October Term, 1895.*

[Reported in 164 Mass. 434].

**COLLISION BETWEEN TRAIN AND WAGON AT GRADE CROSSING — RAISING OF GATES.** — In an action for damages for injuries sustained by plaintiff in a collision with a train at a grade crossing, it was held that an instruction requested by defendant that if the plaintiff, without stopping to look or listen, approached the crossing at a trot, with a heavy load on a highway descending for more than a hundred feet from the tracks, he would be negligent even if the gates were up, was properly refused.

**RULE AS TO STOP, LOOK, AND LISTEN.** — A traveler approaching a railroad crossing is bound to exercise that degree of care which the dangerous character of the place requires of persons of ordinary prudence, but there is no absolute rule of law which obliges him under all circumstances to stop to look or listen (1).

**TORT**, for personal injuries occasioned to the plaintiff, by being struck by a train at the crossing at grade of a highway by the defendant's railroad in Northampton, through the alleged negligence of the defendant. Trial in the Superior Court, before MAYNARD, J., who allowed a bill of exceptions, in substance as follows:

"The plaintiff contended that the defendant was negligent because the gates at the crossing were not closed when a train was about to cross the highway, because the engineer gave no seasonable warning signals, because the gatekeeper nodded to

1. "Stop, Look and Listen." — See Note on the Rule of Stop, Look and Listen, 9 Am. Neg. Rep. 408-416.

him which he took to be an invitation to cross, and because the defendant had, by its employees, put out a red flag on the side of the gatekeeper's tower at a point about nine feet from the ground, and by the side of and over the track on which the train passed, which flag was a signal to the engineer of the approaching train to proceed slowly or stop his train, and this signal was not observed and obeyed, but the train approached the crossing at a rapid rate of speed, and at the same time the gatekeeper, relying upon this flag to stop the train, did not attempt to close the gates.

"The plaintiff offered evidence tending to show that the defendant, in approaching this crossing from the west, with a load weighing about one ton and drawn by a pair of farm horses, that he approached at a moderate speed, and watched and listened for any approaching train, and did not see or hear any train coming upon the tracks, when he was struck by a passing train, and received the injuries complained of. The train was going on the track next east of the gatekeeper's tower. The gates were up when the plaintiff approached and entered the crossing. The evidence was conflicting on the question whether the gatekeeper made any attempt to close the gates.

"There was evidence tending to show that the gates were partly lowered as the plaintiff drove under the western track. The gatekeeper testified that he started to lower the gates as soon as he saw or learned of the approach of the train, as soon as its approach could be known from the tower where he was watching; and that the only reason he did not lower the gates clear down was because the plaintiff's team was under the gates when the gates were lowered, and he was afraid to get them down before there was time to get them down.

"The defendant offered evidence tending to show that the gatekeeper from his tower could see the approaching train about a hundred feet away; that a traveler on the highway approaching the crossing as the plaintiff did could see the train when it was twelve hundred and seven feet away; that for a distance of one hundred feet from the track, where the street is descending, the plaintiff approached with his horses trotting at a rate of from four to five miles per hour; that he approached the crossing without stopping or looking up the tracks until after he was on them; that he was familiar with this crossing and knew of this train, which was due about noon, but which was that day about five or six minutes late; and that he supposed that the train had not passed.

"The plaintiff's evidence tended to show that freight cars stood on intervening tracks, so that a train approaching from the north could not be seen; and that at a very short distance back a brick structure three stories high prevented one from seeing the train. The plaintiff testified that he looked and listened as carefully as he could; that he had his team under control; that he heard no signals and saw no train approaching until he had driven on the westerly tracks; that he got the gatetender's nod when he was about one hundred feet west of the crossing, where he started on a slow trot which he continued until he was struck; and that, just as he saw that the train was upon him, he tried to turn to the right to avoid the train and hastened his horses by swinging a pitchfork. The gatetender denied that he gave a nod or signal to the plaintiff.

"The defendant's evidence tended to show that the plaintiff's view when he was west of the crossing was entirely unobstructed by cars or otherwise.

"There was also evidence tending to show that the train, consisting of an engine, truck, and two passenger cars, stopped after the rear car had passed the crossing only a few feet; that the bell had sounded continuously for a distance of eighty rods or more; that the fireman and engineer did not see the red flag, and did not see the plaintiff's team until they were within about three hundred feet of the crossing; and that no danger signals were given by the whistle, and no special effort made to stop the train, until it was within one hundred and fifty feet of the crossing.

"The engineer testified that he saw the plaintiff when he was approaching, but had not entered upon the crossing, and, in watching him and trying to save him after he saw that he was going on to the track, he did not see the flag; and that, if he had seen it, it would not have made any difference with this speed at the crossing as the flag had no reference to the crossing but to the freight yard south of the passenger station, where there was a freight train. The fireman's station was such that he could not see the flag.

"The defendant introduced testimony tending to show that the red flag was put out because there was a freight train in the yard southerly of the passenger depot. The plaintiff relied upon the rules of the corporation, which were in evidence, as tending to show that an approaching train should reduce its speed or stop



at the signal of a red flag upon the track. He did not see the red flag, or know that it was there.

"The plaintiff called John Mulligan, President of the Connecticut River Railroad Company, which operated the road in question until a short time before the accident, who produced the rules of that company promulgated on November 29, 1891, and he testified that they were the rules under which the road was operated at the time the defendant took possession of the road. He also called the local agent of the defendant, who testified that at the time of the accident, the road was operated under the rules which were in force before the defendant took possession of the road.

"From the rules produced by Mulligan the plaintiff offered to read to the jury the following sections: 'Red flags by day and red lights by night displayed on the tracks are signals of immediate danger, and not to be disregarded, and the train must be brought to a stop as soon as possible. Two flags, one white and one red, placed by the side of the track, is a caution signal, and trains must proceed with care until the obstruction is removed.'

"The defendant offered evidence tending to show that the edition of the rules later than the one produced by Mulligan was in force at the time of the injury, and offered in evidence the following rules: 'A red flag or a red light displayed on the track signifies danger, and is a signal to stop. A stationary red flag or red light, or slow board by the side of the track denotes that the track is imperfect, and the train must proceed with great care, not exceeding eight miles per hour.'

"The plaintiff's counsel thereupon stated that, the rules last offered now appearing to be the rules in force at the time of the accident, he desired to withdraw the evidence of the rules produced by Mulligan. The judge, in the exercise of his discretion, allowed the evidence to be withdrawn, and ordered the rules stricken out, and directed the jury to disregard the evidence of the book of rules dated November 29, 1891, and to disregard Mulligan's testimony in relation thereto. The defendant excepted. The defendant asked the judge to rule that the plaintiff drove down a highway descending upon the track at a point more than 100 feet back from the crossing with a load of hay, and upon a trot, without stopping to look on, and his conduct would be negligent, even if the gates were not approached the crossing. The judge declined so to rule, and the defendant excepted.

"The judge, among other things, instructed the jury as follows: 'A person who should approach a railroad crossing without looking to see or listening to hear if a train were coming, if that was all there was to it, could not be said to be in the exercise of due care, because a crossing is a place of danger, and that person who approaches it without listening or watching, unless there was some circumstance to justify him in not doing it, is not in the exercise of due care. Was there anything of this kind in this case to justify this man in crossing? Did this man look? Did he listen? If he did not do one or both, was there anything to justify him in not doing either one or both? Did he have any invitation to cross? Did the railroad corporation, by its servant or servants, invite him to cross, or did it invite him in such a way that, acting as a reasonable and prudent man, he would be justified in attempting to cross without listening or looking? Was there any notice of that sort which would cause him to attempt to cross without taking such precaution as a man of reasonable care and prudence would do? If not, if he entered upon that road without taking this precaution, he would not be in the exercise of due care.' The jury returned a verdict for the plaintiff; and the defendant alleged exceptions." *Exceptions overruled.*

W. G. BASSETT, for defendant.

J. C. HAMMOND, for plaintiff.

**Morton, J.** — The instruction requested by the defendant, that if the plaintiff, without stopping to look or listen, approached the crossing at a trot, with a heavy load, on a highway descending for more than a hundred feet from the tracks, he would be negligent, even if the gates were up, was properly refused. A railroad crossing is a place of danger, and a traveler approaching one is bound to exercise that degree of care which the dangerous character of the place requires of a person of ordinary prudence. But there is no absolute rule of law which obliges him, under all circumstances, to stop to look and listen. Generally he must look and listen, and in such a manner that the looking and listening will enable him to see or hear an approaching train with reasonable certainty, if one is within the range of his sight or hearing. *Fletcher v. Fitchburg R. R. Co.*, 149 Mass. 127; *Tyler v. Old Colony R. R. Co.*, 157 Mass. 336; *Connolly v. New York & New England R. Co.*, 158 Mass. 8. But it cannot be said as matter of law that there may not be circumstances which

will excuse him from looking and listening, and especial stopping to look and listen. In the present case there is evidence tending to show an invitation on the part of the defendant to the plaintiff to cross. The fact that the plaintiff approached the crossing at a trot, with a heavy load (if it was a fact), does not of itself render his conduct negligent, there being no evidence to show that he could not have stopped if he had had reasonable notice of the coming train.

It was for the jury to say what the object of the flag was, whether its presence had or should have had any effect upon the conduct of those in control of the train or of the gates. In appearing that the rule in force at the time of the accident was the one put in by the defendant, it was competent for the court to permit the plaintiff to withdraw the one put in by the defendant, to direct the evidence in relation to it to be stricken out, and to be disregarded by the jury. *Costelo v. Crowell*, 133 Mass. 572; *Smith v. Whitman*, 6 Allen, 562. It is to be presumed that the jury followed the instructions of the court, and it does not follow that the defendant was harmed by the course which they took.

Exceptions overruled.

## CONATY v. NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

*Supreme Judicial Court, Massachusetts, November Term,*

[Reported in 164 Mass. 572].

**COLLISION AT CROSSING — DRIVING ACROSS TRACK AFTER STOPPING FOR TRAIN — GATES RAISED AT CROSSING — CONDUCT OF PLAINTIFF — TORT — NEGLIGENCE FOR JURY.** — Where plaintiff, who was driving a horse and cart across the tracks at a crossing, had waited for several minutes in front of the closed gates at the crossing, while several trains passed in each direction, and when he started to drive across (on the raised gates) he did not omit to look for approaching trains, and after he had passed in safety after the gates began to rise and before he was struck, it was held that the attempt of plaintiff to cross the tracks under such circumstances could not be said, as matter of law, to be negligent.

**TORT,** for personal injuries occasioned to the plaintiff by crossing the defendant's tracks in Taunton, by a collision with the horse and tip cart driven by the plaintiff, and a loss of property.

1. See note, at end of this case, of Massachusetts cases relating to collisions between trains and vehicles at crossings.

engine of the defendant. At the trial in the Superior Court, before HAMMOND, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion. *Exceptions overruled.*

E. H. BENNETT & F. S. HALL, for defendant.

J. P. LYONS, for plaintiff.

**Barker, J.** — At the crossing there were four parallel railroad tracks, and on the one nearest the plaintiff several high cars were standing on the north or left-hand side of the street, obstructing the view of the other tracks in that direction. The plaintiff found the gates down when he reached the crossing, and waited about three minutes, sitting on his cart, ten or twelve feet from the gates, on the northerly half or left-hand side of the street. While he was waiting, he saw two or three trains pass in each direction. After these trains had passed, the gate tender raised the gates one-half or three-quarters of the way up, and the plaintiff then started to cross, looking down the railroad, south, as soon as he reached the most westerly track, and then turning his head to look north, when he was immediately struck by an engine coming from the north, and which, when he started, was hidden from him by the cars standing on the westerly track.

The plaintiff's position with reference to the center line of the street is immaterial, as the law of the road applies only to persons meeting or passing with vehicles. Pub. St. c. 93, §§ 1, 2. A person who is about to cross a railroad is not under all circumstances obliged to stop to look and listen. *Clark v. Boston & Maine R. Co.*, 164 Mass. 434. Acts of a gateman or signalman which tend to mislead a traveler into the belief that he may cross with safety, and invitations, express or implied, are to be taken into account in determining whether an attempt to cross is negligent. *Warren v. Fitchburg R. Co.*, 8 Allen, 227, 231, 3 Am. Neg. Cas. 748; *Sweeny v. Old Colony & Newport R. Co.*, 10 Allen, 368, 377; *Bayley v. Eastern R. Co.*, 125 Mass. 62; *Johanson v. Boston & Maine R. Co.*, 153 Mass. 57; *Merrigan v. B. & A. R. Co.*, 154 Mass. 189; *Livermore v. Fitchburg R. Co.*, 163 Mass. 132; *Clark v. B. & M. R. Co.*, 164 Mass. 434(1). The plaintiff had waited for several minutes in front of the closed gates while several trains passed in each direction, and the jury might well find that he had a right to consider the raising of the gates

1. The cases cited in the opinion in the case at bar are reported with the Massachusetts cases in this volume of Am. Neg. Cas.

as an indication that the crossing was free. When he crossed, he did not omit to look for approaching trains. The team crossed in safety after the gates began to rise, and the plaintiff was struck. It cannot be said as matter of law that the attempt to cross the tracks under such circumstances was negligent.

Exceptions overruled.

### COLLISIONS BETWEEN TRAINS AND VEHICLES AT CROSSINGS.

Among the Massachusetts cases relating to collisions between trains and vehicles at crossings (other than those reported in this volume) are the following:

#### *Collision at crossing — Duty of railroad company at crossings.*

In *BRADLEY v. BOSTON & MAINE R. R.*, 2 Cush. 101 (1852), defendant's exceptions to verdict rendered for plaintiff for damages sustained in collision with engine at railroad crossing were overruled. It was *held* that "the proprietors of a railroad, when running their engines over crossings, are bound to exercise reasonable care and diligence, to prevent injury therefore to travelers on the road crossed; and whether such care and diligence have been employed in a particular case, is a question to be decided by the jury, upon all the circumstances." It was also *held* that compliance with statutory requirement as to putting up a bell at crossings and ringing bell of engine when passing over crossings did not exempt railroad company from obligation to use reasonable care and diligence in other respects if circumstances required such precautions necessary.

In *LINFIELD v. OLD COLONY R. R. CORP.*, 10 Cush. 101 (1852), judgment was rendered on verdict for plaintiff in damages for injuries to person and property of plaintiff in collision between train of dirt cars belonging to defendant and horse and wagon driven by plaintiff, at a railroad crossing. See ruling in *Bradley v. Boston & Maine R. R.*, 2 Cush. 53 (1852). (See preceding paragraph.)

#### *Collision at crossing — Personal injuries — Damages.*

In *SHAW v. BOSTON & WORCESTER R. R. CORP.*, 45 Cush. 101 (1857), action brought by wife, after death of her husband, against a railroad corporation for injuries occasioned to her husband by collision with their locomotive engine while traveling in the highway.

husband in a vehicle driven by her, judgment was rendered on verdict for plaintiff. There were three trials in the Shaw case the verdicts for plaintiff being \$15,000, \$18,000 and \$22,500, respectively, the two first of which were set aside for erroneous instructions, but the court refused to set aside the third verdict on the ground that damages were excessive, it being shown that plaintiff had lost one arm and the use of the other, and was much bruised and injured, her health and memory impaired, and was in constant pain as the result of the collision.

*Flagman at crossing — Statutory requirement.*

In *COMMONWEALTH v. BOSTON & WORCESTER R. R. CORP.*, 101 Mass. 201 (1869), verdict on indictment on Gen. Stat. c. 63, § 98, to recover for use of widow and children of Luther Bixby a fine by reason of his being run over by defendant's train at grade crossing on which he was traveling with horse and wagon was set aside on ground that evidence was insufficient to warrant finding of negligence against railroad company for failure to provide gate, station agent or flagman at crossing where statute did not require same, and trains could be seen from any point of the highway within 150 feet of the crossing.

Compliance with all statutory requirements does not exempt railroad corporations from liability to an action by a party injured by their omission to take all other reasonable precautions, and whether such precautions are omitted is question for jury. *Comm. v. Boston & Worcester R. R. Corp.*, 101 Mass. 201; *Bradley v. Boston & Maine R. R.*, 2 Cush. 539; *Linfield v. Old Colony R. R. Co.*, 10 Cush. 569; *Shaw v. Boston & Worcester R. R. Co.*, 8 Gray, 73 (see preceding paragraphs).

*Collision at crossing — Contributory negligence.*

In *ALLYN v. BOSTON & ALBANY R. R.*, 105 Mass. 77 (1870), defendant's exceptions to verdict for plaintiff were sustained on ground that evidence not sufficient to show that plaintiff exercised due care. Plaintiff was injured in collision with train at highway crossing while being driven over same in open wagon; the crossing sign was visible five rods or more; and plaintiff testified that he did not know of the crossing, did not look, and that driver was careful, but there was no evidence that driver looked to see whether train was approaching crossing.

*Collision with train — Contributory negligence for jury.*

In *FRENCH v. TAUNTON R. R. CO.*, 116 Mass. 537 (1875), tort to recover for personal injuries sustained by plaintiff in collision

between horse and carriage she was driving and freight highway crossing, verdict for plaintiff was sustained and defendant's exceptions overruled. It appeared that as plaintiff approached the crossing she saw a train pass, but saw no flagman nor warning that another train was coming, and without looking she attempted to cross, but was struck by a freight car which had been separated from the rest of the train in order to make a switch. Whether plaintiff was negligent in failing to look for a train was a question for the jury to determine under the circumstances of the case.

See also *GRIFFIN v. BOSTON & ALBANY R. R.* Mass. 143, where plaintiff having seen a freight train go by and was struck by cars following close behind it, which had afterwards become separated from the train.

*Collision at grade crossing.*

In *BAYLEY v. EASTERN R. R. CO.*, and *SIBLEY v. E. R. R. CO.*, 125 Mass. 62 (1878), two actions of tort, one for injuries to plaintiff's intestate (Stephen Bayley) caused by collision with defendant's train at grade crossing, and the other for injuries to plaintiff's horse and wagon; verdict for plaintiff in each case sustained and defendant's exceptions overruled.

*Invitation to cross by gateman.*

In *DOYLE v. BOSTON & ALBANY R. R. CO.*, 145 Mass. 145 (1888), action for death of plaintiff's intestate caused by collision between his wagon and defendant's train at a grade crossing. It appeared that the deceased was half way across before any warning given or gates shut, that when the gates were shut the gateman warned him, and almost immediately shouted "come on" and opened the gate for him, but it was too late; collision; questions of negligence for jury and verdict for plaintiff sustained.

*Collision at railroad crossing.*

In *HANKS v. BOSTON & ALBANY R. R. CO.*, and *W. BOSTON & ALBANY R. R. CO.*, 147 Mass. 495 (1888), two actions of tort for injuries sustained at a railroad crossing. The first action being for personal injuries received by Hanks while driving with Frank W. Moses, and the second and third actions being for the administrator of Moses, to recover for his death and for his horse and wagon caused by collision with defendant's train. Verdict for plaintiff in each case was sustained and defendant's exceptions overruled.

*Collision at grade crossing — Contributory negligence.*

In *FLETCHER v. FITCHBURG R. R. CO.*, 149 Mass. 127 (1889), defendant's exceptions to verdict for plaintiff were sustained in action for injuries sustained by plaintiff in collision between his team and defendant's train at a grade crossing, it being held that plaintiff was not in exercise of due care at time of accident. From the evidence it appeared that "plaintiff was on the south side of the railroad, driving a four-horse team northward, going for a load of sand. There were two main tracks on the railroad at the crossing of the highway, and two side tracks, one north and the other south of the main tracks. The distance between adjacent tracks was about six and a half or seven feet. On the south side of the railroad, and on the east side of the highway, was a barn thirty feet distant from the nearest side track. A person driving northward on the highway, as soon as he had passed the barn, would have an unobstructed view along the defendant's track towards the east for a distance of over 2,300 feet. The plaintiff was struck by the engine of a regular passenger train coming from the east on the north main track. The accident happened at about nine o'clock in the forenoon and the plaintiff had known for some years that a passenger train from the east arrived there daily at about that time. He was also familiar with the crossing, and knew that no gate nor flagman was maintained there." \* \* \* Plaintiff claimed that a freight train at the crossing obstructed his view of the track.

*Looking and listening at crossing.*

As a general rule, a person is not in the exercise of due care who attempts to cross a railroad track without taking reasonable precaution to assure himself by actual observation that there is no danger from approaching trains. It has been held in many cases that he cannot properly trust his sense of hearing alone, but must use his sight as well, if it is reasonably practicable so to do. See *Butterfield v. Western R. R.*, 10 Allen, 532; *Allyn v. Boston & Albany R. R.*, 105 Mass. 77; *Wright v. Boston & Maine R. R.*, 129 Mass. 440; *Tully v. Fitchburg R. R.*, 134 Mass. 499; *Wheelwright v. Boston & Albany R. R.*, 135 Mass. 225; *Bancroft v. Boston & Worcester R. R.*, 97 Mass. 275; *Mayo v. Boston & Maine R. R.*, 104 Mass. 137; *Allerton v. Boston & Maine R. R.*, 146 Mass. 241; *Granger v. Boston & Albany R. R.*, 146 Mass. 276; *Griffin v. Boston & Albany R. R.*, 148 Mass. 143.

*Collision at crossing — Failure to signal — Evidence — Question for jury.*

In *MENARD v. BOSTON & MAINE R. R. CO.*, 150 Mass. 386 (1890), three actions of tort, the first for injuries sustained by



plaintiff in a collision at crossing while riding with her husband, and the other cases by administrator of husband for death of intestates in same accident, except verdicts directed for defendant sustained, it being held that was evidence for jury to determine as to failure of defendant to ring bell or sound whistle.

*Collision at grade crossing — Duty of traveler.*

In *MERRIGAN v. BOSTON & MAINE R. R. CO.*, 154 Mass. (1891), two actions of tort for personal injuries to husband and wife received in collision at grade crossing while driving, verdict for plaintiff in each case was sustained defendant's exceptions overruled. The court (per HOLMES, J.) in discussing exception an instruction said: "The judge instructed the jury that the presence of gates, seemingly intended to be shut when trains pass, does not excuse the plaintiff from looking before crossing, but he had the right to take the fact into consideration on the question to what extent he would look. This instruction does not seem contradictory, and it does appear to us correct. We believe it accurately expresses the actual effect of an open gate at a grade crossing upon the minds of careful people, and it is in accordance with the decisions as to flagmen whose attitude conveys the message that there is no present danger. *Johanson v. Boston & Maine R. R. Co.*, 153 Mass. 57." \* \* \*

*Collision at crossing — Gateman lowering gate.*

In *WARREN v. BOSTON & MAINE R. R. CO., AND OTHERS*, 163 Mass. 484, verdict for plaintiff was sustained in action for personal injuries sustained by plaintiff, who, with his wife, driving in a buggy on the street across defendant's tracks where gates were lowered by the gateman and the buggy shut in behind the gates, where it was hit by a train of the Boston & Maine road.

*Collision at grade crossing — Statute — Instruction.*

In *HICKS v. NEW YORK, NEW HAVEN & HARTFORD R. CO.*, 164 Mass. 424 (1895), two actions of tort, the first for personal injuries to plaintiff and for damage to his property by collision with defendant's train at a grade crossing, and the second case to recover for death of plaintiff's wife who was killed in same accident, there was a verdict for plaintiff in each case, defendant alleged exceptions. In the first case the exceptions were overruled and in the second case sustained. The exception as to erroneous instruction as to liability under Pub. St., c. 112,

DRIVING ACROSS TRACK AT PRIVATE CROSSING AND STRUCK BY TRAIN — TRESPASSER — RAILROAD COMPANY NOT LIABLE. — In *DONNELLY v. BOSTON & MAINE RAILROAD*, 151 Mass. 210 (*February Term, 1890*), plaintiff's exceptions were overruled, the facts and points being stated by HOLMES, J., as follows: "This is an action for running down and injuring the plaintiff while crossing the defendant's track. At the point in question, a public road came down to the defendant's station on the west side of the track. On the east side were the Merrimac Chemical Works, surrounded by a fence, in which, opposite the road, was a gate with a lock, and marked "No Admittance." The chemical company maintained a crossing between the gate and the road for the convenience of its own business, by the license of the defendant. We must take it that both the defendant and the plaintiff knew of the sign on the gate. They also knew that there was a public way leading to the chemical works by an overhead bridge at a little distance. The plaintiff testified that he found the gate open, and drove through it in order to carry a friend to the chemical works, and he was returning from them by the same way at the time of the accident. He was run down in the daytime by the twelve o'clock train, which was on time, and which he knew was to be expected about the time when he tried to cross. His view was obstructed by cars on a track laid for the use of the chemical works, which had been placed where they were by the chemical company; but he did not stop. The facts disclose no invitation or license by the defendant to the plaintiff. The plaintiff's rights at most were only those of a member of the public having business with the chemical works. But the prepared crossing maintained by the chemical company did not import an invitation, or even a license, by any one to any part of the public, because it ended on a gate which warned the public that they could not enter, thus plainly showing that the license was confined to the chemical works. There was no evidence of any use of the crossing by the public known to the defendant, or so general that the defendant might be presumed to have known it. The defendant, therefore, was not bound to anticipate the plaintiff's being where he was, and owed him no duty to look out for him, or to take precautions against the chance of his being there. There is no suggestion that it was negligent after it knew that the plaintiff was on the track. *Wright v. Boston & Albany R. R.*, 142 Mass. 296. See *Sweeny v. Old Colony & Newport R. R.*, 10 Allen, 368, 373; *Hanks v. Boston & Albany R. R.*, 147 Mass. 495, 496; *Reardon v. Thompson*, 149 Mass. 267; *Philadelphia & Reading R. R. v. Hummell*, 44 Pa. St., 375, 379. Even if the plaintiff had

not been upon the track without right, he shows no for not ascertaining that the train was coming. He knew was to be expected. He had not been induced by the duty to suppose that the place was one where he had a right to hear a bell or whistle by the Pub. Sts., c. 112, § 163. That the chemical company's cars obstructed his view did not exonerate him from all duty to investigate. The cars were not so as to give him a view of the track before he reached *Mayo v. Boston & Maine R. R.*, 104 Mass. 137, 143, 3 Am. Cas. 773, a case in which the court express their inability to say how the accident could have happened without some want of care on the plaintiff's part. There were none of the difficulties the way of discovering the truth which existed in *P. Humphreys*, 34 Fed. Rep. 282, 285, and we are not called on to consider the New York cases there cited. A very little care would have shown the plaintiff the danger. *Fletcher v. Fitchburg*, 149 Mass. 127; *Bancroft v. Boston & Worcester R. R.*, 97 Mass. 3 Am. Neg. Cas. 765. Exceptions overruled."

## WHITE v. WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

*Supreme Judicial Court, Massachusetts, October Term, 1891*

[Reported in 167 Mass. 43].

**COLLISION BETWEEN STREET CAR AND WAGON — NEGLIGENCE OF MOTORMAN.** — Where it appeared that plaintiff had driven across defendant's track from the right side of the road, in order to pass around a passing vehicle in his way and while crossing back again to his proper side of the road his rear left wheel was struck by defendant's electric car, and when the electric car came up behind him, he requested instruction by defendant that if he had an unobstructed view of the approaching car and there was no reason to prevent him from turning off the track, the driver of the car had no right to assume that plaintiff would seasonably turn off the track to avoid collision, and that if plaintiff was properly refused; as was also a request to instruct that if plaintiff proceeded in his vehicle ahead of the car, and in a course outside of the track parallel with the track, the motorman had a right to presume that plaintiff would not turn upon the track and was warranted in proceeding at his usual rate of speed (1).

**TORT**, for personal injuries occasioned to the plaintiff by being run down by an electric car. At the trial in the Superior Court before BRALEY, J., the jury returned a verdict for the plaintiff.

1. See note at end of this case, of cases relating to collisions between street cars and vehicles.

and the defendant alleged exceptions. The facts appear in the opinion. *Exceptions overruled.*

H. PARKER & C. C. MILTON, for defendant.

W. A. GILE, for plaintiff.

**Holmes, J.** — The plaintiff had driven across the defendant's track from the right side of the road, in order to pass around a standing vehicle which was in his way; and he was crossing back again to his proper side of the road when his left wheel was struck by an electric car which came up behind him. According to the defendant's evidence the accident was due to the plaintiff's stopping suddenly just in front of the car, but the plaintiff testified that he did not stop but was driving continuously around the other vehicle. Other details of fact were in dispute.

The defendant asked for an instruction that, if the plaintiff had an unobstructed view of the approaching car, and there was nothing to prevent the plaintiff from turning off the track, the driver of the car had a right to assume that the plaintiff would seasonably turn off the track to avoid accident. This was refused, and we are of opinion that the refusal was correct. We do not suppose that the instruction asked was intended as a proposition of fact based on the practice and experience of the community. In some parts of the State, at least, it is well known that drivers of vehicles wishing to cross a track assume that electric cars will look out for them at least as much as they look out for the cars. But we suppose that the request was intended to embody a statement of the rights of electric cars irrespective of practice, and to put street railways on very nearly the footing of steam railroads. Whatever may be the law as to the latter, there is great difference between the two cases. Electric cars are far more manageable, and more quickly stopped, than trains upon steam railroads. Their tracks are in the highway, where all vehicles have a right, not merely to cross, but to travel. In view of the inability of the cars to leave their tracks, it is the duty of free vehicles not to obstruct them unnecessarily, and to turn to one side when they meet them, but subject to that and to the respective powers of the two, a car and a wagon owe reciprocal duties to use reasonable care on each side to avoid a collision. See *Galbraith v. West End Street Railway*, 165 Mass. 572, 580. Neither has a right to assume that the other will keep out of the way at its peril, although the electric car has a right to demand that the wagon shall not obstruct it by unreasonable

delay upon the track. If the jury believed, as they might, that the plaintiff did not know of the close proximity of the car, that the motorman did see the plaintiff's wagon and saw that it was proceeding in the ordinary way around an obstacle, and that he was going along the track with reasonable speed, they well might find that the due care required the motorman to move slowly or stop until the plaintiff was out of the way. In *Glazebrook v. Worcester Street Railway*, 160 Mass. 239, the plaintiff was coming across the street, the car, and the driver had a right to expect him to turn reasonably, as there was nothing to prevent it. Here, according to the plaintiff's story, he was turning off as quickly as he could in order to regain his side of the way.

The defendant asked for a second instruction, that the plaintiff was proceeding in his vehicle ahead of the car, and that, on a course outside of but parallel with the track, the motorman had a right to presume that the plaintiff would not turn upon the track, and under such circumstances the motorman is warranted in proceeding at the usual rate of speed. This also was refused. With reference to the undisputed facts in the case it would be misleading and incorrect. If anything could be said by the judge as to what the plaintiff might be expected to do, it might be that he might be expected to turn back to the right-hand road where he belonged, and from which he had come before. Even if no part of his previous movements had been seen, the right of the road was the part to which he naturally would tend.

Exceptions overruled.

#### COLLISIONS BETWEEN STREET CARS AND VEHICLES

Among the Massachusetts cases relating to personal injuries sustained in collisions between street cars and vehicles, are the following:

##### *Collision between street car and vehicle.*

In *LYMAN v. UNION RY CO.*, 114 Mass. 83 (1873), verdict for plaintiff was sustained, in tort for injuries sustained in a collision between plaintiff's wagon and defendant's street car.

##### *Defective car track.*

In *COOK v. UNION RY CO.*, 125 Mass. 57 (1878), accident caused by defective rails on track, plaintiff being thrown out of wagon he was injured; questions of negligence for jury and case ordered to stand.

##### *Fireman Injured in collision between street car and ladder truck.*

In *MAGEE v. WEST END STREET RY CO.*, 151 Mass. 240 (1890), where plaintiff was unable to completely dress himself before starting for fire, completed

ment while on rapidly driven ladder truck, and was injured while doing so by reason of the truck colliding with defendant's street car, verdict for plaintiff was sustained, it being for jury, and not for court, to determine question whether plaintiff exercised due care.

*Collision between street car and vehicle.*

In *KERRIGAN v. WEST END STREET R'Y CO.*, 158 Mass. 305 (1893), collision between street car and plaintiff's wagon, direction of verdict for defendant was overruled, as the question of negligence of the parties was for the jury.

*Collision between street car and vehicle — Instructions — Negligence of parties.*

In *GLAZEBROOK v. WEST END STREET R'Y CO.*, 160 Mass. 239 (1893), collision between plaintiff's wagon and street car, plaintiff's exceptions to refusal of trial court to give certain instructions were overruled. MORTON, J., said: "The plaintiff was driving with the high wheels of his wagon in a rail of one of the defendant's tracks. There was space enough for him to drive on the outside of tracks without danger of collision with the cars. The evidence was contradictory whether he attempted to get out of the rail or drove straight ahead till the wagon and car collided. His view of the approaching car was unobstructed and there was nothing to prevent him from turning out. The driver of the car had a right to assume that he would turn out seasonably. When the driver became aware that the plaintiff was not going to turn out, it was his duty to do what he reasonably could to avoid a collision. The jury were so instructed, and may have found so. The jury were also rightly instructed that the plaintiff could not recover if the accident was due to his own negligence, and that if he was where he ought not to be, but was not negligent in being there, the driver was bound to do what he reasonably could to prevent injury to him. Exceptions overruled."

See also *ROBBINS v. SPRINGFIELD STREET R'Y CO.*, 165 Mass. 30 (1895), collision between street car and wagon; verdict for plaintiff.

*GALBRAITH v. WEST END STREET R'Y CO.*, 165 Mass. 572 (1896), death of person driving wagon caused by collision with electric car while attempting to cross track; verdict for defendant.

## RANDOLPH V. O'RIORDON AND ANOTHER (TWO CASES).

*Supreme Judicial Court, Massachusetts, January Term, 1892.*

[Reported in 155 Mass. 331.]

**JOINT TORT FEASORS — PLEADING AND PRACTICE.** — In actions, brought by husband and wife against two defendants for personal injuries occasioned to plaintiffs from a collision between vehicles belonging to defendants, plaintiffs having hired a carriage to attend a funeral, but one of the defendants having control of the driver, and the accident was caused by negligence of driver of the other vehicle owned by the other defendants it is no defense by latter that the negligence of the driver of the carriage in which plaintiffs were riding contributed to the injury (1).

1. See note on Imputed Negligence, 11 Am. Neg. Cas. 151-156,

## COLLISION BETWEEN VEHICLES—INSTRUCTIONS—RULE OF

— Instructions to the jury in action for injuries sustained in a collision between vehicles one of which was being driven on wrong side of the road that it was a question of fact whether, under the circumstances, the negligence of the drivers being on the wrong side of the road was negligence; that the fact that he was, while tending to show that he was in fault, was not conclusive evidence, and that it was a question upon all the evidence whether the party upon the wrong side of the road was negligent, that the instructions in this circumstance, were correctly given.

TWO ACTIONS OF TORT, brought by a husband and wife, respectively, against Patrick O'Riordon and John Bryant, for personal injuries occasioned to the plaintiff from a collision between two vehicles belonging to the defendants. Writs dated August 1889. The cases were tried together in the Superior Court before THOMPSON, J., who allowed a bill of exceptions, the substance of which is as follows:

"The plaintiffs offered evidence that Mr. Randolph had employed the defendant Bryant to superintend the funeral of their grandfather on November 29, 1884, Bryant to furnish the carriage and drivers therefor; that the hack in which the plaintiffs were traveling was furnished by Bryant under his agreement, together with a driver, whose name was Hewton, and who had been in the plaintiff's employ for some time as a driver; that as they were returning from the cemetery to Charlestown, where they lived, and were passing along Austin Street, a public highway, the hack came into collision with a heavy wagon belonging to the defendant O'Riordon, driven by a man in his employ, and both the plaintiffs were injured; that at the time the accident occurred Hewton was driving at the rate of from eight to ten miles an hour on the left hand side of the middle of the traveled part of the street; that the defendant O'Riordon's team was being driven in the same direction at a walk on the driver's left of the middle of the traveled part of the street, but this was not the only negligence of the defendant O'Riordon; and that the total width of the hack was six feet, and there was at least ten feet of space of paved way to the right of the hack at the place where the collision occurred, and there was ample room for Hewton to have driven his hack either to the right or to the left of the approaching team without coming into collision therewith.

"The defendant O'Riordon requested the judge to instruct the jury as follows:

“ ‘1. The negligence of the driver of the hack in which the plaintiffs were riding was the negligence of the plaintiffs; and if it contributed to the injury, the plaintiffs cannot recover against defendant O’Riordon.

“ ‘2. If the negligence of the defendant Bryant’s driver was the proximate cause of the injury the plaintiffs cannot recover of the defendant O’Riordon, although the negligence of O’Riordon’s driver contributed to the injury, and although such injury would not have happened without such negligence of O’Riordon’s driver.

“ ‘3. If between the negligent acts of O’Riordon’s driver and the injury to the plaintiffs there intervened the negligent act of the driver of Bryant’s carriage, and such intervening act was the proximate cause of the injury, the defendant O’Riordon is not liable.

“ ‘4. The defendant O’Riordon is liable only for the natural and probable results of his driver’s negligence; and if the negligent act of Bryant’s driver was not and ought not to have been anticipated by O’Riordon’s driver, and directly produced the damage, then O’Riordon is not liable, even though the collision would not have occurred unless O’Riordon’s driver was negligent.

“ ‘5. The defendant O’Riordon had a right to drive his team upon the left of the middle of the traveled part of the road, and the fact of his team being there is not of itself evidence of negligence.

“ ‘6. This action, not being commenced within one year from the date of the collision declared on, cannot be maintained.’

“The judge refused to give the above instructions, but instructed the jury as follows:

“ ‘You have had your attention called to the position of O’Riordon’s wagon upon the road. Before you can pass intelligently or fairly upon the question as to the effect of his position, you must ascertain and determine where his wagon actually was; because, until you ascertain that fact, you will not be able to determine as to the effect of his position upon the road. The law of the road, as it is termed, has been called to your attention, which I will read: ‘When persons meet each other on a bridge or road, traveling with carriages, wagons, carts, sleds, sleighs, or other vehicles, each person shall seasonably drive his carriage or other vehicle to the right of the middle of the traveled part of such bridge or road, so that their respective carriages or other



vehicles may pass each other without interference.' It follows, that, because a party is upon the left-hand side of the road, that therefore the party is guilty of negligence — is care person may be answerable to the statute, and still not be guilty of negligence and carelessness in being in a position where the statute directs he shall not be in; but it is a question under all these circumstances, whether his being in that position was negligence or carelessness. The fact that he is upon the wrong side of the way is evidence upon that question, to show that he is in fault, but it is not conclusive; the question, where there are other facts than the mere fact of being upon the wrong side of the way, is a question, upon which the jury may find evidence, whether or not the party so upon the wrong side of the way is negligent. It might be carelessness to other than for him to be upon the right side of the way; there are contingencies such as that; but the person is to exercise care, and is held answerable in law for his negligence and carelessness, and the jury are to consider the law of the road in connection with the testimony bearing upon that question; if you find that O'Riordon's driver is not guilty of negligence that caused the injury, then O'Riordon is not to be held responsible. In order to hold him responsible, it must be shown that he was guilty of negligence in the driving of the team that caused the injury was the natural, probable, and proximate result of that carelessness. And if it was, then he may be held responsible. It is not necessary, to make the defendant liable, that the defendants should have jointly participated in each particular act of carelessness that caused the injury; it is not necessary that the driver of the hack should have participated in the carelessness of the driver of the wagon, or that the driver of the wagon should have participated in the carelessness of the driver of the hack; but if the combined careless act of the defendants produced the collision, which was the natural and proximate result of the carelessness of each of the defendants, then they may be jointly held answerable for the result of such carelessness. If the natural and probable result of O'Riordon's carelessness was to produce the collision, and the natural and probable result of the carelessness of Bryan was to produce the collision which caused the injury, then the act of each may be said to be the natural, probable, and proximate cause of the injury; and if such individual care

combined caused the collision, producing the injury, then they may have jointly caused the injury, and may be jointly or severally liable for the injury.

“ ‘But if the collision was not the natural, probable, and proximate result of the carelessness of O’Riordon, then he cannot be held responsible; and if it was not the natural, probable, and proximate result of the carelessness of Bryant, then Bryant cannot be held responsible. If the collision was the natural and probable result of the carelessness of both of the defendants, then they may be held to answer jointly; if of neither of them, then the verdict must be rendered for both defendants. If it was the natural and probable result of the carelessness of the one, and not of the carelessness of the other defendant, then that defendant may be held responsible whose careless act caused the collision, provided it was the natural and probable and proximate result of such carelessness. So you will see, if neither was careless, the verdict is to be for both defendants; if both were guilty of negligence, which caused the injury, then the verdict is to be against both defendants; if one of them was guilty of negligence that caused the injury, and the other was not, then the verdict is to be against the one whose negligence caused the injury, and the jury will find for the other defendant.

“The jury returned a verdict for the plaintiff against the defendant O’Riordon, and for the defendant Bryant; and the defendant O’Riordon excepted.

“After verdict, the defendant O’Riordon moved to set aside the verdict and that a new trial be granted, for the alleged misconduct of the foreman of the jury; and it appeared upon the hearing of this motion that the foreman of the jury had a small memorandum-book and a lead pencil, and made some minutes of the evidence during the examination of the witnesses in the presence of all the counsel, and no objection was made to it. The foreman had this book in his pocket when he retired with the jury to consider the case. The counsel for the defendant O’Riordon asked the judge to rule that this conduct of the foreman was improper, and was such misconduct as would vitiate the verdict. The judge declined so to rule, and found as a fact that, if such conduct was improper, the defendant’s right to take advantage of it had been waived, and overruled the motion for a new trial; and the defendant O’Riordon alleged exceptions.”

*Exceptions overruled.*

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H. W. BRAGG, for defendant O'Riordon.

W. S. SLOCUM (C. H. CROSBY with him), for plaintiff

**Morton, J.** — The presiding instructed the jury, in substance, among other things, that they might find one or both defendants liable; that, in order to find either liable, they must find that there was carelessness on the part of his driver, and that, if the accident was due to the carelessness of both drivers, then both defendants were liable. He also instructed them that if one driver was careless, and his carelessness was the natural, probable, and proximate cause of the accident, and that other driver was not careless, then they should return a verdict against the defendant who was master of the careless driver, and for the defendant whose driver was not careless. The jury returned a verdict against defendant O'Riordon, and for defendant Bryant. The defendant O'Riordon now claims that the jury should have been instructed also as he requested, viz. that if the carelessness of Bryant's driver contributed to the accident, he (O'Riordon) was not liable, whether it was or was not the proximate cause of the accident. This claim rests on the theory that the negligence (if any) of the driver was to be imputed to the plaintiff, and that, again, on the position that the relation of master and servant existed between them. If the plaintiff and the driver of Bryant's hack had been total strangers to each other, it is obvious that it would have been no defense for O'Riordon to say that the negligence of Bryant's driver contributed to the accident. That defense could not be maintained by him unless there was some relation between the plaintiff and the driver which would make him responsible for or in some way connected with his acts; and in the present case that relation, if it existed at all, must have been the relation of master and servant. The facts were that the defendant Bryant was hired by the plaintiff, Peter Randolph, to superintend the funeral of his grandfather, and to furnish the carriages and drivers. Bryant furnished a hack, and a driver named Hewton, who had been in his service for some time as his hackman. While the plaintiff was returning from the funeral Hewton driving, the accident occurred. The directions appear to have been given to or control assumed by Hewton by the plaintiff. We think upon these facts that the relation of master and servant did not exist between the plaintiff and Hewton. What Bryant really agreed with the plaintiff

do was to transport him to and from a certain place or places. For that purpose he sent his hack and his driver. The hack was in his control, through his agent or driver, all the time. It was the same as if Bryant himself were driving and managing and controlling the team. And it would be contrary to common experience to say that Bryant would have been or that Hewton was the servant of the plaintiff, or that he was Hewton's master, or would have been Bryant's master. Whether the hack and driver were hired at a public stand or of a private person could make no difference, nor whether the party furnishing them was engaged in the business of a common carrier of passengers or not. It would not do to say that one who buys a passage from New York to Liverpool sustains the relation of master to the officers and crew and owners of the steamer on which he embarks. No more would it do to say that one who buys conveyance for his own person or his family from one place to another within the same city or adjoining cities thereby assumes towards the driver of the hack, which the party who agrees to convey him furnishes, the relation of a master to a servant, or liability for his acts, uncommanded and uninterfered with by him. The defendant relies upon *Thorogood v. Bryan*, 8 C. B. 115 (1). It is enough, perhaps, to say of that case that it has been expressly overruled and disaffirmed in England, and has not been followed by the Supreme Court of the United States, and the courts of last resort in many different states. "It rests upon indefensible grounds," says the Supreme Court of the United States. *Little v. Hackett*, 116 U. S. 366, 375; *Mills v. Armstrong*, L. R. 13 App. Cas. 1; *The Bernina*, 12 Prob. Div. 58; *State v. B. & M. R. Co.*, 80 Me. 430; *Chapman v. N. H. R. Co.*, 19 N. Y. 341; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *N. Y., L. E. & Western R. Co. v. Steinbrenner*, 18 Vroom, 161; *Bennett v. N. Y. Railroad Co.*, 7 Vroom, 225; *Transfer Co. v. Kelly*, 36 Ohio St. 86; *Wabash, St. L. & Pac. R. Co. v. Shacklet*, 105 Ill. 364; *Thompkins v. Clay Street R. Co.*, 66 Cal. 163; *Cuddy v. Horn*, 46 Mich. 596; *Danville, Lancaster & Nicholasville Turnpike Co. v.*

1. See *NOTE ON THOROGOOD V. BRYAN*, has been repudiated in the English courts and, generally, in this country. 8 C. B. 115. in 11 Am. Neg. Cas. 145-146, showing that the doctrine enunciated therein, which had been extensively followed in the American courts, See also note in 6 Am. Neg. Rep. 10, showing the American authorities where the doctrine in *Thorogood v. Bryan*, 8 C. B. 115, is repudiated.

*Stewart, 2 Metc. (Ky.), 119; Louisville, Cin. & Lex. R. Co. v. Case, 9 Bush, 728.* In the case of *Allyn v. B. & A. R. Co., 105 Mass. 79*, it did not appear how the plaintiff and Haskell came to be riding together, and the court held, and rightly so, that "if the plaintiff failed to use the care which prudence required, relying upon the vigilance of his companion, he must prove that Haskell was in the exercise of due care, not only in the management of his horse, but in using the necessary precautions to guard against danger from passing trains." This was very different from saying that Haskell's negligence was to be imputed to the plaintiff, if he had been a passenger in a hack of which Haskell was the driver. It was merely saying that if in a dangerous place one person trusted another person to look out for him he must show that such person used due care. We think, therefore, that the instructions requested were rightly refused.

The defendant objects, in the next place, to the instruction that the fact of the defendant being on the left of the middle of the traveled part of the road was evidence of negligence. The court, in substance, instructed the jury that it was a question of fact whether, under all the circumstances, his being in that position was negligence; that the fact that he was upon the wrong side of the way was evidence tending to show that he was in fault, but was not conclusive; and that it was a question, upon all the evidence, whether or not the party upon the wrong side of the way was negligent, that being a circumstance. These instructions conformed to the law as heretofore laid down by this court, and were correct. *Damon v. Scituate, 119 Mass. 66; Steele v. Burkhardt, 104 Mass. 59; Jones v. Andover, 10 Allen, 18.*

If the fact that one of the jurors takes notes of the evidence which he carried into the jury-room with him were valid ground of complaint, it was disposed of by the finding of the court that it had been waived by the defendant. The request as to the time within which the action should have been brought has not been argued, and we therefore treat it as waived.

Exceptions overruled.

**MURPHY v. ARMSTRONG TRANSFER COMPANY.**

*Supreme Judicial Court, Massachusetts, November Term, 1896.*

[Reported in 167 Mass. 199].

**PERSON CROSSING STREET STRUCK BY HORSE AND VEHICLE — QUESTION FOR JURY.** — In an action to recover damages for injuries sustained by plaintiff who, while crossing a street, at the junction of two streets, about six o'clock in the evening, was struck by a horse and vehicle belonging to defendant which vehicle according to the driver's evidence, was lighted with lanterns and the horses were going at a slow trot, and there was no other team in the vicinity, it was held that the question of negligence of the parties was for the jury to determine (1).

**TORT**, for personal injuries occasioned to the plaintiff, in colliding with the horses attached to a hack and driven by the defendant's servant.

"At the trial in the Superior Court, before BLODGETT, J., after the evidence was all in, the defendant requested the judge to rule as follows: '1. Upon all the evidence in the case, the plaintiff is not entitled to recover. 2. There is no evidence in the case that the plaintiff was herself in the exercise of due care. 3. There is no evidence in the case that the plaintiff's injuries were due to the negligence of the defendant, or of any agent or servant of the defendant.' But the judge refused so to rule. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion." *Exceptions overruled.*

M. F. DICKINSON, JR., & M. HOLBROOK, for defendant.

H. F. NAPHEN & W. J. MILLER, for plaintiff.

**Knowlton, J.** — In this case the evidence of negligence on the part of the defendant's driver is inconsiderable, and the evidence of due care on the part of the plaintiff is still less. From the printed report of the evidence in the bill of exceptions, it seems probable that the negligence of the plaintiff contributed more largely to the accident than negligence of the defendant's servant; but we cannot say, as a matter of law, that there was no evidence that the driver was negligent. He testified that he did not see the plaintiff until the collision occurred. He was driving a hack drawn by two horses, at a slow trot, at a little

1. See note at end of this case, relating to persons injured while crossing street, being run over or struck by horses and vehicles.

after 6 o'clock in the evening of October 4, 1893, southward, along Hudson street, in Boston, across Harvard street. He testified that the lanterns on his hack were lighted, and there was evidence tending to show that there were lights in grocery stores on both corners of Hudson and Harvard streets, on the northerly side of Harvard street. The plaintiff was crossing Hudson street on the crosswalk on the southerly side of Harvard street. The evidence tended to show that there was no other team in the vicinity, and the jury might have found that he was negligent in not looking before him before he crossed Harvard street, so carefully as to discover the plaintiff before his horses struck her. The plaintiff testified that she was going westward, along the southerly side of Harvard street, in the usual way, looking before her; and that, when she got a little more than one-half way across Hudson street, she was struck, and thrown down on the crossing, and, when she recovered her consciousness, she was under the feet of the horses, on the right-hand side—that is, on the westerly side of the pole. There was evidence tending to show that she was mistaken in regard to the place where she found herself, in her account of the collision; but whether she was or not was a question of fact for the jury. If they believed her testimony, it indicated that she had passed beyond the center of the line of travel of the team before the collision, and that the horse at the right of the driver ran against her.

It has repeatedly been held that the mere failure of a pedestrian to look and listen for approaching teams as he passes over a crosswalk at the junction of two streets is not necessarily such negligence as will prevent recovery if he is run over by a passing team. *Shapleigh v. Wyman*, 134 Mass. 118; *Purtell v. Jordan*, 156 Mass. 573-577; *Benjamin v. Holyoke Street R. Co.*, 100 Mass. 3. If it appears that a plaintiff was walking along in the usual way, where persons are accustomed to walk, it is ordinarily a question of fact for the jury whether, in so walking at the time of the accident, he was in the exercise of due care. *Purtell v. Jordan*, *ubi supra*; *Williams v. Grealy*, 112 Mass. 79; *Bowser v. Wellington*, 126 Mass. 391; *Rand v. Syms*, 162 Mass. 163; *Robbins v. Springfield Street R. Co.*, 165 Mass. 30. We are of opinion that in the present case there was evidence proper for the consideration of the jury in support of the proposition that the plaintiff was in the exercise of due care.

Exceptions overruled.

### ACCIDENTS TO PERSONS CROSSING STREET, BEING RUN OVER OR STRUCK BY HORSES OR VEHICLES.

See the following Massachusetts cases relating to persons injured by being run over or struck by horses or vehicles, while crossing street:

*Runaway horse at street crossing — Pedestrian injured.*

In *WILLIAMS v. GREALY*, 112 Mass. 79 (1873), it was held that "it cannot be determined that there was error in a refusal to rule that a foot passenger, who was injured by a runaway horse at a street crossing was not in the exercise of due care, from the mere fact that she did not look as she crossed to see if anything was coming when it appears at the trial there was other and unreported evidence which bore upon that question." Judgment for plaintiff on the verdict.

*Pedestrian run over by wagon.*

In *SCHIENFELDT v. NORRIS*, 115 Mass. 17 (1874), verdict for plaintiff was sustained, in tort to recover for injuries sustained by plaintiff who, while crossing a street, was run over by wagon which was being driven by defendant's servant.

*Run over by wagon.*

In *BOWSER v. WELLINGTON*, 126 Mass. 391 (1879), tort for personal injuries occasioned to plaintiff in being run over while crossing street by a horse and wagon driven by defendant, it was held that the fact that it was not shown that plaintiff looked up and down the street before crossing is not conclusive evidence, as matter of law, that he was not in the exercise of due care, it being for the jury to determine that question. Verdict for plaintiff for \$3,000 sustained.

See also similar ruling in *SHAPLEIGH v. WYMAN*, 134 Mass. 118 (1883), where plaintiff, a woman, was knocked down by horse and wagon while crossing street and verdict for plaintiff was sustained.

*Fast driving in street — Pedestrian run over.*

In *PURTELL v. JORDAN*, 156 Mass. 573 (1892), where plaintiff (Purtell) was struck by defendant's horse and cart while crossing a street, verdict for plaintiff was sustained, the court holding that there was sufficient evidence for jury to find that defendant's servant was negligent in driving too fast and that plaintiff was using due care, and that the question of negligence of the parties was for the jury to determine from the facts.

*Collision between vehicles — Rule of the road.*

In *RAND v. SYMS*, 162 Mass. 163 (1894), tort for personal injuries to plaintiff and for damages to his horse and vehicle, alleged to have been caused by negligent driving by defendant of her horse whereby plaintiff was crowded off the road and against a bridge, verdict for defendant was sustained and plaintiff's exceptions overruled. The court (per MORTON, J.) said: "The defendant was not bound under all circumstances to keep to the right of the center of the road nor to look behind her when passing from one side to the other. *Lovejoy v. Dolan*, 10 Cush. 495; *Meservy v. Lockett*, 161 Mass. 322. If a team was approaching in the opposite direction, it was her duty to turn to the right, and if she had reason to believe that the plaintiff was behind her, or at her side, it was her duty not to obstruct him, and to use reasonable care in passing from one side of the road to the other not to injure him." \* \* \*



## SULLIVAN v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

*Supreme Judicial Court, Massachusetts, October Term, 1891.*

[Reported in 154 Mass. 524].

**PEDESTRIAN STRUCK BY TRAIN AT GRADE CROSSING — CONTRIBUTORY NEGLIGENCE.** — In an action to recover damages for personal injuries sustained by being struck by a locomotive at a grade crossing, it appeared that the accident happened on a clear summer day, about eleven o'clock in the forenoon; that travelers approaching the crossing had an unobstructed view of the track for some distance; that plaintiff lived in the vicinity, was familiar with the crossing, and accustomed to pass over the same; that she was between sixty and seventy years of age and possessed of good sight and hearing; that there was no gate nor flagman at the crossing; that plaintiff looked up and down the track but saw no train, but when on the near track she heard a train approaching, and without looking to see where it was, she hurried to get across, fell on the track and was injured. *Held*, that the question of plaintiff's gross or wilful negligence was properly submitted to the jury (1).

**TORT**, for personal injuries occasioned to the plaintiff by being struck by a locomotive engine at a crossing at grade of the defendant's railroad and a highway in Westfield. At the trial in the Superior Court, DEWEY, J., at the close of the evidence, refused to rule, as requested by the defendant, 1, that "upon all the evidence in the case the plaintiff cannot recover;" 2, that "the plaintiff was grossly negligent, and such negligence contributed to her injury," and, 3, that "there is no sufficient evidence to warrant the jury in finding that the plaintiff was not grossly negligent, or that her negligence did not contribute to the injury;" and submitted the case to the jury upon instructions, to which no exception was taken. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions." The case is sufficiently stated in the opinion. *Exceptions overruled.*

G. D. ROBINSON, for defendant.

J. B. CARROLL, for plaintiff.

**Barker, J.** — The plaintiff, a foot traveler on the highway, was struck by a locomotive at a grade crossing. The accident

1. *Crossing accidents.* — See Note on Contributory Negligence in crossing-accident cases as a question for jury, 10 Am. Neg. Rep. 566-576. See also at end of this case notes of *Massachusetts* cases relating to persons injured on track or at crossings.

happened on a clear summer day, about eleven o'clock in the forenoon. The railroad had, within a short time before the accident, been raised so as to be about three feet higher than the level of the sidewalk on which the plaintiff approached from the east. The work of grading was unfinished, and the crossing was in a broken and poor condition, with one plank on each side of the rails. The ground was rough, so that teams had to walk across. There were three railroad tracks at the crossing, and the locomotive was on the middle track, coming from north to south. The plaintiff's line of travel was diagonally across the tracks. From the end of the sidewalk to the tracks the space was filled with soft gravel. The height of the car windows from the ground was seven feet, and from the level of the sidewalk, ten feet. A building and the branches of a butternut tree obstructed the view from the sidewalk. These were the only obstructions, looking northward, to a bridge, a distance of nine hundred and eighty-five feet from the place of the accident. After a person passed on to the line of the railroad from the sidewalk, there was no obstruction to his view except the branches of the tree, and after reaching the nearest track there was no obstruction. A person approaching the railroad in the plaintiff's line of travel could see in a clear line of vision from a point forty-two feet from the nearer rail of the middle track three hundred and fifty-two feet northward; at thirty-two and one-half feet, nine hundred and eighty-five feet; at twenty-eight and one-half feet, thirteen hundred and fifty-eight feet; and at twenty-three and one-half feet, fourteen hundred and sixty-eight feet. There was no gate nor flagman at the crossing. The plaintiff lived in the vicinity, was familiar with the locality, and accustomed to pass over the crossing. She was between sixty and seventy years of age, of ordinary intelligence, and possessed of good sight and hearing.

The declaration was in two counts, the first under the Pub. Sts., c. 112, § 213. At the close of the evidence the court ruled that the plaintiff could not recover on the second count, which was at common law, and the jury found a verdict for the plaintiff on the first count, and found specially that the defendant neglected to give the signals required by the statutes. The question raised by the bill of exceptions is, whether the court was justified in submitting the case to the jury upon the first count, or whether upon all the evidence it appeared, as matter of law,

that the plaintiff, in addition to a mere want of ordinary care, was guilty of gross or wilful negligence.

In addition to the facts above stated, there was evidence tending to show that, if the plaintiff had looked at all before going on the track, she could have seen the approaching train a quarter of a mile away; that she was familiar with the passing of trains, and had often before run across ahead of the train; that she did not look up the track at all; and that shortly before she was struck by the locomotive, and before she had entered upon the middle track, and while she was yet in a place of safety, she had heard the sharp whistles, or "toot, toot, toot" of the engine, and knew that the train was coming at speed, and, notwithstanding this, attempted to cross in front of it. There was also evidence tending to show that before she left the sidewalk the train was actually in full view, approaching the crossing; that when she heard the danger whistles, she looked up directly at the train, and hurried up to get across, and tried to walk faster, and started to run ahead of the train; that when the danger whistle sounded she was between the east and middle tracks; that she fell down before she was struck, and fell on the west rail of the middle track; that if she had stood still when the danger whistle sounded she would have been safe; and that she stumbled and fell on her knees and elbows, between the two rails of the middle track, and was struck by the train as she was trying to rise. One of the plaintiff's witnesses testified that he heard the danger whistles, turned his eyes to the crossing, and saw the old lady; that her hands were up in this manner (showing), and she made one step and down she went, and recovered herself to the extent of getting partially on her hands and knees.

The plaintiff herself testified that, before she went on the railroad track, she looked up and down and did not see any engine or train, and did not hear anything; that she started to go across the track; that the track was soft; that she heard a "big boo" coming, and did not know what it was, and did not know anything else that happened there. She said, upon cross-examination, that she was going to the store to get some groceries, and had a pail in her hand, and wore a shawl and hood; that before she went on the track she looked here and there, up and down, and saw no train, but saw the bridge; that when she was on the sidewalk she looked, but saw no cars, and saw nothing until she heard the noise when the train came down; that when she got

upon the track she looked, and saw no train, and did not see the train at all until she heard it coming; that she was on the first track when she heard the noise, and did not then look to see where the train was, but kept right on, and tried to clear the track; that she started to go right across just as fast as she could; that she did not look to see if the train was on the next track coming; that she did not hear the train until it was on her; that when she heard the noise the track was soft, and she started to run across, and fell down right on the track; that when she was on the first track she looked up and down, and did not hear the train; that before she went on the track she looked up and down, and did not see any train; and that she did not hear any sharp, short whistles, or any whistle at all.

The plaintiff introduced in evidence the whole testimony given by the plaintiff at a former trial of the case, in which she testified, upon cross-examination, that when she got right on the track she heard the "toot, toot, toot," just as it was right up to her; that it was the engine that made the noise, and that it scared her out of her senses, that when she heard the noise she was going back from track, and started to run, and ran right on the track, and tumbled down on the track in front of the engine; that the noise that was in her head, and the train, and all that, took her senses right away; and that it was the first place in her life that she had not her senses.

It is plain, upon this evidence, that the plaintiff was not in the exercise of ordinary care. If she looked, as she testified that she did, and did not see the approaching train, she looked carelessly. If she looked and did see it, it was certainly not ordinary care to attempt to walk in front of it. If she did not look, her failure was, at least, a want of ordinary care. But a mere want of ordinary care would not defeat her recovery under the first count of her declaration, and the burden of proving gross or wilful negligence rested upon the defendant. It is apparent that from the evidence a jury would be justified in finding that the plaintiff was in fact guilty, in addition to a mere want of ordinary care, of gross or wilful negligence. The evidence discloses no need or motive which would justify her in taking extraordinary risks. She was merely walking from her home to a neighboring store to purchase groceries. She was familiar with the crossing and its attendant dangers. If, as might be found from the evidence, she attempted, in such circumstances, to cross in full view of a

rapidly approaching train, without looking to see whether or not danger was imminent, her negligence would be properly characterized as gross. If, knowing that the train was approaching at speed, and realizing the danger of attempting to cross in front of it, she understandingly and intentionally took the risk of so doing, without any other motive than to avoid waiting while the train passed, her negligence would be gross and wilful. *Copley v. New Haven & Northampton Co.*, 136 Mass. 6; *Debbins v. Old Colony Railroad*, 154 Mass. 402. If situations similar to these, which plainly might have been found by the jury, are the only ones which could fairly and reasonably be found from the evidence, then it was the duty of the court to rule, as matter of law, that the plaintiff upon the evidence, was guilty of gross or wilful negligence, and to direct a verdict for the defendant. But, in our opinion, other inferences consistent with the theory that the plaintiff was guilty of want of ordinary care may fairly be drawn from the evidence, and, if so, the court was right in submitting the question to the jury. The usual ringing of the bell and sounding of the whistle were omitted. If, before entering upon the railroad, the plaintiff looked up and down and saw nothing, and again when entering upon the east track looked and saw no train, it could not be said, as matter of law, that up to that point she was guilty of gross or wilful negligence in not having become aware of the approach of a train which came without the required and customary warning. If, when made aware of its approach by hearing the danger whistles, she was confused by the sudden peril, and went in front of the train because of her confusion, she could not be said to have been guilty of gross or wilful negligence. *Copley v. New Haven & Northampton Co.*, 136 Mass. 6 (1).

It is plain that either of the situations supposed, and perhaps others consistent with gross or wilful negligence, or with the want of it, may have been fairly found by a jury from the evidence. Under such circumstances it is the province of the jury to deal with the evidence under proper instructions from the court, which in this case were no doubt given.

Exceptions overruled.

1. See the cases cited in the opinion in the case at bar, reported with the *Massachusetts* cases in this volume of AM. NEG. CAS.

NOTES OF CASES RELATING TO PEDESTRIANS INJURED  
ON TRACK OR AT CROSSINGS.

Among the Massachusetts cases relating to persons injured on track or at crossings (other than the cases reported in this volume) are the following:

*Injured in collision while loading cars.*

In *FLETCHER v. BOSTON & MAINE R. R.*, 1 Allen, 9 (1861), it was held that "a railroad company is responsible for an injury occasioned by want of proper care and prudence on the part of its servants in the management of a train which is under their exclusive care, direction and control, although the train belongs to another company. But if such injury is occasioned by the negligence of another railroad company, whose car, for the purpose of being loaded by the plaintiff, has been placed upon the side track of the defendants which is in constant use by other roads, such other company is bound to use reasonable care to prevent a collision; and if it fails to do so, and the plaintiff receives an injury from a collision while engaged in loading the car, he cannot recover against the company whose cars caused the collision." Defendant's exceptions to verdict for plaintiff sustained and new trial granted.

*Run over and killed on railroad track.*

*COMMONWEALTH v. FITCHBURG R. R. CO.*, 10 Allen, 189 (1865), person run over and killed on railroad track; railroad company found guilty of negligence.

*Person crossing track run over by train at private crossing.*

In *SWEENEY v. OLD COLONY & NEWPORT R. R. CO.*, 10 Allen, 368 (1865), judgment was rendered on verdict for plaintiff for \$7,500, plaintiff being run over by defendant's train as he was crossing their track at a private crossing on signal from flagman at crossing. The syllabus of the official report states the case as follows: "If a railroad company have made a private crossing over their track, at grade, in a city, and allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there is danger, they may be held liable in damages to one who, using due care, is induced to undertake to cross by a signal from the flagman that it is safe, and is injured by a collision which occurs through the flagman's carelessness."

*Struck by train while crossing track — Failure to look — Contributory negligence.*

In *BUTTERFIELD v. WESTERN R. R. CORP.*, 10 Allen, 532 (1865), it was held that "a traveler upon a highway which is crossed

by a railroad on a level, who knows that he is near the crossing and yet does not look up to see if a train is coming, simply because there is a storm and the traveling is bad, is guilty of such negligence that he cannot recover damages for an injury sustained by him from a collision with a passing train, although the bell was not rung nor the whistle sounded." Defendant's exceptions sustained and verdict for plaintiff for \$1,500 set aside.

*Person injured at grade crossing — Failure to provide gate or flagman — Statute.*

In *EATON v. FITCHBURG R. R. CO.*, 126 Mass. 364 (1880), judgment for plaintiff on verdict was rendered, in action for injuries sustained by her at a grade crossing. The court ruled (as per syllabus to the official report) that "in an action against a railroad corporation, under a declaration alleging that the plaintiff, while traveling on the highway, was injured at a grade crossing 'by reason of the carelessness and negligence of the agents and servants of the defendant,' the jury may consider whether, under all the circumstances of the case, the defendant was guilty of negligence in not having a gate or a flagman at the crossing, although never requested by the selectmen of the town, nor ordered by the county commissioners, to do so, under the statute of 1874, c. 372, § 126."

See also, on this point, *BRADLEY v. BOSTON & MAINE R. R.*, 2 Cush. 539; *LINFIELD v. OLD COLONY R. R.*, 10 Cush. 562; *NORTON v. EASTERN R. R.*, 113 Mass. 366; *FAVOR v. BOSTON & LOWELL R. R.*, 114 Mass. 350; *COMM. v. BOSTON & WORCESTER R. R.*, 101 Mass. 201.

*Crossing track at place not crossing.*

In *WRIGHT v. BOSTON & MAINE R. R.*, 129 Mass. 440 (1880), judgment was rendered for defendant in action for injuries sustained by plaintiff who, while crossing the defendant's track at a place not a crossing, was run over by defendant's train.

*Pedestrian struck and killed by freight train.*

In *COMMONWEALTH v. BOSTON & MAINE R. R.*, 133 Mass. 383 (1882), defendant's exceptions to findings on certain counts in the indictment were sustained. ALLEN, J., in stating the case said: The third count in substance charged "that at a certain place the railroad crossed a highway upon the same level; that one Sanborn was traveling on the highway and in the exercise of due diligence; that a locomotive engine attached to a freight train was passing the place of intersection; that a locomotive engine was coming in the

opposite direction; that, while the corporation was thus running the last-named locomotive engine, it was the duty of the corporation, when approaching said place of destination in view of the position of said first-named locomotive and train of freight cars, to reduce its rate of speed and give proper signals and warnings: but that the corporation neglected to do so, and with said last-named engine ran over and killed said Sanborn.

"This count is founded on the St. of 1874, c. 372, § 163, which imposes a penalty upon the corporation, if, by reason of its negligence or carelessness, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of any person being a passenger, or of any person being in the exercise of due diligence, and not being a passenger or in the employment of said corporation, is lost. The count, it will be observed, does not charge the unfitness or gross negligence or carelessness of servants or agents of the corporation, but negligence of the corporation itself." \* \* \* "It thus appearing that there is a distinction between the negligence or carelessness of the corporation itself, and the gross negligence or carelessness of its servants or agents while engaged in its business, it becomes necessary in framing an indictment to select and set forth with accuracy the ground which is to be relied on. The negligence of the corporation itself is one thing, and the gross negligence of its servants or agents is another thing, and an averment of one is not supported by proof of the other. In many cases, it is true that, as a corporation usually acts by agents, an averment of negligence on the part of a corporation may be supported by proof of negligence on the part of its agents. But this is not applicable to a liability imposed by a statute which expressly distinguishes between the grounds of liability, as does the statute now under consideration. In such a case as the present, negligence on the part of the corporation cannot be established by showing negligence on the part of its servants or agents, and by invoking the aid of a presumption that their negligence must be presumed to have been in pursuance of orders of the corporation itself. The statute makes a plain distinction; the pleader selects the ground on which the liability of the defendant is to be made to rest; a line of precedents recognizes and illustrates the distinction between the two grounds; and to allow the pleader to select the negligence of the corporation itself as the ground on which its liability is to be maintained, and to support it by proving merely the negligence of servants or agents, and by asking a court or jury to infer the existence of negligence on the part of the corporation from mere proof of negligence on the part of its servants or agents,



would be to obliterate the distinction expressed in the statute, and to depart from the common rule of pleading. See *Comm. v. Fitchburg R. R.*, 126 Mass. 472. Looking at the third count of this indictment in the light of these principles, we are of opinion, not only that it was unsupported by the evidence in the case, but that it is not a good count in itself. There was no proof, and there is no averment, that the corporation, by general rule or otherwise, had given to its servants or agents any instructions which were improper or unsuitable, or had so far failed to give proper and suitable instructions that the omission could justly be attributable to it as negligence; but the evidence and, by fair implication, the averment show that the negligence relied on was the omission to do what ought to have been done under the peculiar circumstances of a particular occasion; that is to say, the occasion of a passenger train unexpectedly meeting a freight train at a highway crossing." \* \* \*

In *COMM. v. BOSTON & MAINE R. R.* (preceding paragraph), it was held that a railroad is responsible under the statute referred to for neglect of its servants to give signals required by § 123 when crossing a highway at the same level as its road; also that the statute is not limited to cases where injuries do not result in death but applies as well to cases of loss of life.

*Woman injured crossing track — Contributory negligence.*

In *YOUNG v. OLD COLONY R. R. CO.*, 156 Mass. 178 (1892), woman struck by train while crossing track, it was held that direction of verdict for defendant was proper. The court (per MORTON, J.) said: "We think, upon the facts disclosed in the exceptions, that the plaintiff was not in the exercise of due care. She attempted in broad daylight to cross the track in front of an approaching train, which she saw, and which was only a short distance away — so near, in fact, that when she stumbled and fell upon the track, the engine struck her before she could recover herself. It was also due to her own failure to make proper inquiry that she attempted to cross the tracks at all." \* \* \*

In *TYLER v. OLD COLONY R. R. CO.*, 157 Mass. 336 (1892), woman struck and killed by train at grade crossing, it was held that verdict was properly directed for defendant, the court (per LATHROP, J.) stating the facts as follows: "The plaintiff's intestate was about seventy-three years of age, and in good health, except that she was slightly lame. She wore glasses because she was near-sighted but it does not appear that she could not see well with glasses. She lived thirty rods from the crossing; and all the way from her house to the crossing the tracks of the defendant's road

were visible in the direction from which the train came for a distance of a quarter of a mile. She walked from her house onto the crossing without looking to see if any train was coming, when she was struck and instantly killed. This was in the day time and it is plain that, had she made use of any of her faculties she could not have failed to see the train." \* \* \* Verdict properly directed for defendant. (Citing numerous cases, which are reported with the Massachusetts cases in this volume of AM. NEG. CAS.)

The court also cited CADWALLADER *v.* LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO., 128 Ind. 518, a case very like the Tyler case (preceding paragraph), to the effect that the absence of a flagman at a crossing, where it is customary to have one stationed, does not excuse a traveler from looking to see if a train is coming, before he attempts to cross. (See 11 AM. NEG. CAS. 505.)

As to contributory negligence of person crossing track, see also CONNOLLY *v.* NEW YORK & NEW ENGLAND R. R. CO., 158 Mass. 8 (1893), where verdict was properly directed for defendant. (Citing DEBBINS *v.* OLD COLONY R. R., 154 Mass. 402; YOUNG *v.* OLD COLONY R. R., 156 Mass. 178; TYLER *v.* OLD COLONY R. R., 157 Mass. 336, cases reported in this volume of AM. NEG. CAS., *supra*.)

*Struck by train while working on track.*

17 CHISHOLM *v.* OLD COLONY R. R. CO., 159 Mass. 3 (1893), where a telegraph company's employee while endeavoring to remove a fallen pole from defendant's track was struck and fatally injured by an express train it was held that there was no evidence to warrant a jury in finding defendant's servants guilty of gross negligence in failing to stop the trains in time to have avoided the accident and judgment was rendered on verdict directed for defendant.

*Killed by train while walking on track — Contributory negligence — Failure to give signal — Statute.*

In LIVERMORE *v.* FITCHBURG R. R. CO., 163 Mass. 132 (1895), action under Pub. St., c. 112, §§ 212, 213, to recover damages for death of plaintiff's intestate who, while walking on defendant's track, was run down by a train, it was held that "to recover under § 212 it must be shown that the deceased was in the exercise of due diligence, and to recover under § 213 it must be shown that the defendant neglected to sound its whistle or to ring its bell as required by § 163 as amended by St., 1890, c. 173, § 1," and there being no evidence of either fact a jury would not be warranted in presuming that deceased took the necessary precautions to avoid danger. Plaintiff's exceptions overruled. (Citing Tyler *v.* Old

Colony R. R., 158 Mass. 336; *Menard v. Boston & Maine R. R.*, 150 Mass. 386; *Hubbard v. Boston & Albany R. R.*, 159 Mass. 320; *Davis v. N. Y., N. H. & H. R. R. CO.*, 159 Mass. 532.)

*Failure to signal at crossing.*

As to proof of failure to ring bell or sound whistle when train is approaching crossing see *HUBBARD v. BOSTON & ALBANY R. R. CO.*, 159 Mass. 320 (1893), where defendant's exceptions were sustained in action for death of person killed by train while driving across track; and also *DAVIS v. NEW YORK, NEW HAVEN & HARTFORD R. R. CO.*, 159 Mass. 532 (1893), where an employee was struck by train while repairing track, and *LYNCH v. BOSTON & ALBANY R. R. CO.*, 159 Mass. 536 (1893), employee killed by train in switch yard.

## WOODMAN v. METROPOLITAN RAILROAD COMPANY.

*Supreme Judicial Court, Massachusetts, May Term, 1889.*

[Reported in 149 Mass. 335].

### OBSTRUCTION ON STREET-CAR TRACK — INDEPENDENT CONTRACTOR — PEDESTRIAN INJURED WHILE CROSSING STREET.

— Where defendant company employed a contractor to lay a new street-car track, but the ends of the rails so projected beyond barriers insufficiently placed by the contractor in the street at a point where there was no cross-walk, that plaintiff while crossing the street in the evening fell over the rails and was injured, it was held that defendant was liable, notwithstanding that the work of laying the track was being done by an independent contractor (1).

1. *Defective track.* — See Note on Liability of Street-railroad Company for Failure to Keep Track and Street Fit for Travel, 11 Am. Neg. Rep. 565-574.

*Person on sidewalk struck by runaway horse that had tipped over the sleigh.*

In *OVINGTON v. LOWELL AND SUBURBAN ST. R'Y CO.*, 163 Mass. 440 (1895), where it appeared that a street-railway company, after a storm, was engaged in removing snow from its tracks in a city street, using, by permission of the authorities, snow ploughs which

heaped the snow at the side of the tracks, the company was not liable, in the absence of evidence that the work was done negligently, or by improper methods, or that the snow was unnecessarily piled up in the street, and not seasonably removed, for injuries to a traveler on the sidewalk who was struck by a runaway horse and sleigh belonging to a third person, who had driven into the street where the tracks were, from a side street, and into the pile of snow where the sleigh was tipped over, the occupants dumped out, and the horse ran away.

TORT, by the administratrix with the will of Sir Moses D. Perkins, for personal injuries sustained by him, through the alleged negligence of the defendant while crossing Adams Square in Boston. Trial in the Superior Court, before SHERMAN, J., who allowed a bill of exceptions, which so far as material was as follows:

"There was evidence tending to show the following facts: Perkins was injured on October 15, 1885, at about half-past six o'clock in the afternoon, at which time it was dark, the sun on that day having set at two minutes past five o'clock. On that date the defendant was having an additional car track laid through the lower part of Adams Square, which is a public highway in the city of Boston, from Devonshire street northerly into New Washington street. The defendant had duly obtained a location from the proper municipal authorities, and a permit to dig up the street, and Gore & Company, contractors, were doing the work. A trench had been excavated through Adams Square, except at a point where an existing track called the South Boston track extended from Devonshire street northerly and westerly into Brattle street, passing in a curve around the east and north side of the Adams Monument, so called, placed near the center of the square. This track, with a clear space of several feet on either side, was left unobstructed, for passage between the easterly and westerly portions of the square. At each side of the passage and across the ends of the trench were placed wooden horses as barriers. Between that portion of the trench on the southerly side of this passage and the monument was a pile of dirt thrown up in digging, and then a pile of rails, ten or fifteen in number, thirty feet long and ten or fifteen inches high, lying parallel with the excavation. At the close of work on October 15, a barrier consisting of one or two heavy sticks of timber, and intended to protect passers-by from injury by reason of the excavation or of the piles of dirt and rails, had been placed so as to extend from the pile of dirt to the curb of the monument, the middle portion running across and above the pile of rails, and supported upon it by a block of wood placed on the rails. The ends of the rails projected irregularly beyond this barrier and towards the passage, as was variously estimated, from five or eight inches to four or five feet.

"The shortest route for a person going from the lower or east side of Adams Square over towards Brattle street was through

the passage above described, between the two portions of the trench. There was no crosswalk maintained through this passage. The plaintiff's testator, who was between eighty-three and eighty-four years old, was seen just before the accident walking at a moderate pace across Adams Square through this passage towards Brattle street, and at a point about half-way between the monument and the South Boston track was seen to fall. When he was reached by those who came to his assistance, he was lying on the ground within two feet of the end of the pile of rails, and on the side towards Brattle street, and was found to have been injured. Assistance was rendered him, and he was taken to his home. The next morning spots of blood were found on the pavement, from twelve to eighteen inches from the projecting ends of the rails.

"On the question whether the place where the accident occurred was properly lighted, the evidence was conflicting. One witness only testified that there was no lantern on the pile of rails, and that an electric light near by in the square was not burning; while many other witnesses testified that the electric light was burning, and that lighted lanterns were placed on the timbers lying across the pile of rails and all along the trench.

"Upon the issue as to the defendant's liability for the acts of those employed to do the work, evidence was admitted tending to show that the work was done under a verbal agreement between Gore & Company, the contractors, and the president of the defendant corporation; that the defendant was to furnish the materials, and the contractors were to procure the permit, supply the labor, and do all the work except the teaming, and were to attend to the lighting and fencing of the place where the work was to be done; that the barriers were placed and the lights set by persons employed by the contractors; and that the rails were left where they were by order of the contractors' foreman.

"The judge refused to give the following instructions, as requested by the defendant:

" '1. Plaintiff cannot recover on the whole evidence.

" '2. The plaintiff has not sustained the burden of proof on the question of Mr. Perkins's exercise of due care, and therefore cannot recover.

" '3. There is no evidence to go to the jury that Mr. Perkins when he fell was in the exercise of due care.

“ ‘4. There is an utter absence of any evidence of what Mr. Perkins’s conduct was just before he fell and when he fell, and so there is no sufficient evidence to justify the jury in finding that he was in the exercise of due care.

“ ‘5. If it is impossible for the jury to say what Mr. Perkins was doing, and what his conduct was just before he fell and at the moment he fell, the plaintiff has not sustained the burden of proof, and the verdict of the jury must be for the defendant. \* \* \*

“ ‘8. Mr. Perkins, being a foot passenger, was bound to keep on the sidewalks and street crossings in passing from the lower to the upper side of Adams Square, and by unnecessarily diverging therefrom he took the consequences, and his administratrix cannot recover.

“ ‘9. The Metropolitan Railroad Company, having employed Gore & Co. to construct the new track, is not liable for any injury suffered by plaintiff’s testator caused by negligence of Gore & Co.’s servants, if there was such negligence.

“ ‘10. If the jury are satisfied that under this contract between the defendant and Gore & Co. it was the duty of the latter to place proper barriers and lights, then the defendant cannot be held liable for any negligence of Gore & Co. in failing to place the barriers and lights properly, if the jury should find they were improperly placed.

“ ‘11. There is no sufficient evidence of negligence or carelessness on the part of Gore & Co. or its servants in placing the barriers and lights to warrant the jury in finding a verdict against the defendant.’

“ The judge, after instructing the jury that the plaintiff must prove that the testator was in the exercise of such care as a person of his age would ordinarily exercise under the circumstances, said, among other things: ‘Something has been said about where Mr. Perkins had a right to walk, and where he had not a right to walk. I do not understand that there is any rule of law in regard to that. A man has a right to walk anywhere in the street or sidewalk, provided he exercises due care. If it is not due care to leave a sidewalk or flagging, then he is not in the exercise of due care. If it was due care, considering all the circumstances surrounding the case, to leave the sidewalk and flagging, then he had a right to leave it if he was exercising due care in leaving it. You are to determine, considering all the

evidence bearing upon what was being done there, where the place was that he was walking, what the barriers and the lights were — everything bearing upon that question — whether he was at the time exercising due care."

"The judge also instructed the jury: 'Some question has been raised about whether the defendant corporation was liable, provided it had made a contract with Gore & Co. to do this work. I do not understand that this railroad company had a right to relieve itself of its duty to the public, when it had permission to open those streets and to mend its ways or lay down new tracks, or that it can avoid or relieve itself from liability for carelessness, by letting out the contract. I therefore instruct you that if Gore & Co. put those rails where they were located, and that the sole cause of the accident was the putting them there and not properly guarding them, then that would not excuse the defendant, and it would be liable for this accident provided you find that the plaintiff was in the exercise of due care, and that Gore & Co. were negligent.' The jury returned a verdict for the plaintiff; and the defendant alleged exceptions." *Exceptions overruled.*

M. F. DICKINSON (G. D. BRAMAN with him), for defendant.

R. M. MORSE, JR., & M. MORTON, JR., for plaintiff.

**Holmes, J.** — The plaintiff's testator was injured by a fall in the street. He was seen to fall, and was picked up senseless at a point where some rails projected beyond a temporary barrier enclosing a place where the defendant was having a track laid. There was no evidence of any other possible cause of the fall. This warranted a finding that he tripped over the end of the rails.

The street was a public highway, and the jury very properly might find that it was negligent to allow the ends of the rails to project beyond the barrier, especially if they believed that it was dark at the place, as one witness testified, although the weight of the testimony looks the other way on paper.

There was testimony that the plaintiff's testator was walking in the usual way just before he fell. Taking into account what he had a right to assume with regard to that part of the street which was not enclosed by barriers, the jury was warranted in finding that he was using due care. *Learoyd v. Godfrey*, 138 Mass. 315, 324; *Lyman v. Hampshire*, 140 Mass. 311, 314. Indeed, if they believed that it was dark, they might have considered that the testator had been led into a trap. It is suggested

that he was not crossing at a regular crossing. But his rights were not changed by a slight change in the pavement. He had a right to cross where he chose, if the jury thought that he used due care. *Raymond v. Lowell*, 6 Cush. 524; *Gerald v. Boston*, 108 Mass. 580.

It is argued that the work was done by an independent contractor. Assuming that there was evidence warranting that conclusion, we are of opinion that the fact would not exonerate the defendant. In some cases a party is liable notwithstanding the intervention of an independent contractor lawfully employed. A plain case is when he is made personally responsible by statute for the prevention of the cause of the damage complained of. *Gray v. Pullen*, 5 B. & S. 970 (1). Thus it is settled in many states that a city charged with the duty of keeping the streets in repair is answerable for an improperly guarded excavation made by a contractor; for instance, in building a sewer. *Storrs v. Utica*, 17 N. Y. 104; *Detroit v. Corey*, 9 Mich. 165; *Birmingham v. McCary*, 84 Ala. 469; *Logansport v. Dick*, 70 Ind. 65; *Houston & Great Northern R. R. Co. v. Meador*, 50 Tex. 77; *Circleville v. Neuding*, 41 Ohio St. 465, 469; *Baltimore v. O'Donnell*, 53 Md. 110; *Robbins v. Chicago*, 4 Wall. 657, 679; *Water Co. v. Ware*, 16 Wall. 566. In the present case it would not stretch the words of the Public Statutes and of the defendant's charter very much to say that such personal duty was imposed upon it. Pub. Sts. c. 113, § 32, St. 1853, c. 353, § 3.

See *Quested v. Newburyport & Amesbury Horse Railroad*, 127 Mass. 204; *Osgood v. Lynn & Boston R. R.*, 130 Mass. 492; *Brookhouse v. Union Railway*, 132 Mass. 178; *Braslin v. Somerville Horse Railroad*, 145 Mass. 64.

But further, apart from statute, if the performance of a lawful contract necessarily will bring wrongful consequences to pass unless guarded against, and if, as in the present case, the contract

1. In *Gray v. Pullen*, 5 B. & S. 970, it was held that where a statutory obligation is imposed on a person, he is liable for any injury that arises to others in consequence of its having been negligently performed, whether by himself or by a contractor employed by him. From the facts in the case it appeared that A. was employed, under 18 & 19 Vict., c. 120, §§ 77, 110, 111, to make a drain from his premises to a sewer, by cutting a trench across a highway, and filling it up after the drain should be completed. For this purpose he employed a contractor, by whose negligence it was filled up improperly, in consequence of which damage ensued to B. *Held*, that A. was responsible for it.



cannot be performed except under the right of the employer, who retains the right of access to the premises, the law may require the employer at his peril to see that due care is used to prevent harm, whatever the nature of his contract with those whom he employs. *Sturges v. Cambridge Theological Education Society*, 130 Mass. 414; *Stewart v. Putnam*, 127 Mass. 403, 407; *Gorham v. Gross*, 125 Mass. 232, 240; *Bower v. Peate*, 1 Q. B. D. 321 (1), approved in *Dalton v. Angus*, 6 App. Cas. 740, 4 Q. B. D. 162, and 3 Q. B. D. 85 (2); *Pickard v. Smith*, 10 C. B. (N. S.) 470 (3); *Hole v. Sittingbourne & Sheerness R'y Co.*,

1. In *Bower v. Peate*, 1 Q. B. Div. 321, it was held that a man who orders a work to be executed on his own premises, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent mischief; and cannot relieve himself of his responsibility by employing some one else to do what is necessary to prevent the act he had ordered to be done from becoming wrongful. The facts in the case were: B. and P. were respective owners of two adjoining houses, B. being entitled to the support, for his house, of P.'s soil. P. employed a contractor to pull down his house, excavate the foundations, and rebuild the house; the contractor undertook the risk of supporting B.'s house, as far as might be necessary during the work, and to make good any damage and satisfy any claims arising therefrom. B.'s house was injured, in the progress of the work, owing to the means taken by the contractor to support it being insufficient. *Held*, that P. was liable, even if the undertaking as to risk had amounted, which it did not, to an express stipulation that the contractor should do, as part of the works contracted for, all that was necessary to support P.'s house.

2. In *Dalton v. Angus*, L. R. 6 App. Cas. 740 (1881), it appeared that after two adjoining dwelling-houses had remained each on the extremity of its owner's soil for more than twenty years, one was converted into a coach factory, the internal walls being removed and girders inserted into a stack of brickwork in such a way as to throw much more pressure upon the soil under the adjoining house. The conversion was made openly and without concealment. More than twenty years after the conversion the owners of the other house employed a contractor to pull it down and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. During the excavation plaintiff's factory, being deprived of the lateral support, fell down. *Held*, that the owners as well as the contractor were liable. See also same case, *Angus v. Dalton*, 4 Q. B. Div. 184, 6 App. Cas. 829.

3. In *Pickard v. Smith*, 10 C. B. N. S. 470, 4 L. T. N. S. 470, it appeared that refreshment rooms and a coal cellar at a railway station were let by the company to S., the opening for putting the coals into the cellar being on the arrival platform. A train coming in while the servants of a coal merchant were shooting coals into the cellar for S., a passenger, whilst passing in the usual way out of the station,

6 H. & N. 488, 500 (1); *Circleville v. Neuding*, 41 Ohio St. 465.

Laying the track for the defendant necessitated the digging up of the highway, and the obstruction of it with earth and materials. This obstruction would be a nuisance unless properly guarded against. The work was done under a permit issued to the defendant. Considering the general principle of the law, and also the special relations of horse railroads to the highway and the policy of the statutes, so far as the Legislature has expressed itself upon the subject, we are of opinion that the defendant, having caused the highway to be obstructed, was bound at its peril to see that a nuisance was not created. *Veazie v. Penobscot R. R.*, 49 Me. 119, 123. See also *Darmstaetter v. Moynahan*, 27 Mich. 188.

Exactly how far this principle shall be carried is a question of nicety. But on the whole we are of opinion that the present case falls within it, and does not resemble those where the cause of injury was an application of force to the person or property of the plaintiff by a transitory act or by a defect in machinery.

Exceptions overruled.

without any fault of his own, fell into the cellar opening, which the coal merchant's servants had negligently left insufficiently guarded. *Held*, that S., the occupier of the refreshment rooms and cellar, was responsible for this negligence.

1. In *Hole v. Sittingbourne & Sheerness R'y Co.*, 6 H. & N. 488, the facts were as follows: A railway company was authorized by act of Parliament to construct a railway bridge across a navigable river. The act provided that it should not be lawful to detain any

vessel navigating the river for a longer time than sufficient to enable any carriages, animals or passengers, ready to traverse, to cross the bridge, and for opening it to admit such vessel. The company employed a contractor to construct the bridge in conformity with the provisions of the act of Parliament, but before the works were completed, the bridge, from some defect in its construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river. *Held*, that the company was liable for the damage thereby caused.

## WALLACE, ADMINISTRATOR, v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

*Supreme Judicial Court, Massachusetts, February Term, 1896.*

[Reported in 165 Mass. 236.]

**GIRL PASSING BETWEEN FREIGHT CARS ON TRACK — RAILROAD NOT LIABLE.** — Where a girl thirteen years old, while attempting to pass through an opening about six or eight feet wide between two cars of a freight train which was standing on the track in the defendant's freight yard near a station, was killed by the two cars coming together, it was held that an action could not be maintained under the statute, no emergency being shown which would justify the deceased in taking the risk of passing between the cars (1).

TORT, under Pub. Stat. c. 112, § 212, by the administrator of the estate of Annie J. Wallace, for causing her death. Trial in the Superior Court, before FESSENDEN, J., who, at the defendant's request, ruled that the plaintiff was not entitled to recover,

1. *Accidents to children on the street.* — See NOTE ON ACCIDENTS TO CHILDREN WHILE ON THE STREET, 11 Am. Neg. Rep. 488-498.

*Child playing on track run over by train — railroad not liable.* — In MORRISSEY v. EASTERN R. R. Co., 126 Mass. 377 (1879), tort for injuries to plaintiff, a child four years of age, who, while playing on defendant's track, was run over by a train, judgment was rendered on verdict for defendant, it being held that "a railroad corporation is not liable for running over a child who is using the track of the corporation as a playground, if the act is not done maliciously or with gross and reckless carelessness."

*Boy struck by train at private crossing — Railroad liable.* — In MURPHY v. BOSTON & ALBANY R. R. Co., 133 Mass. 121 (1882), verdict for plaintiff for \$5,000 was sustained, in action for damages for injuries sustained by him by being

struck by defendant's train at a private crossing which plaintiff was crossing on returning home from school, the crossing being used by the public and maintained by the railroad company for a considerable time. The court said: "If the defendant held this out as a public crossing, and thus induced or invited the public to use it as such, it was bound to use reasonable precautions to protect the public when using it under this inducement or invitation." Defendant's exceptions overruled. (Following Sweeny v. Old Colony & Newport R. R., 10 Allen, 368.)

*Girl killed at grade crossing — Negligence for jury.* — In COPLEY v. NEW HAVEN & NORTHAMPTON Co., 136 Mass. 6 (1883), where it appeared that a girl, sixteen years old, was run over and killed by defendant's train at a grade crossing, verdict for plaintiff was sustained, the burden of proof being upon defendant to show that the girl was guilty of gross or wilful negligence,

and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion. *Exceptions overruled.*

J. E. COTTER & R. T. CONROY, for plaintiff.

J. H. BENTON, JR., for defendant.

**Knowlton, J.** — We may assume in favor of the plaintiff, without deciding, that the keeping of a post office in the passenger station of the defendant by its station agent, with its consent, was a use of the building which constituted an invitation by the defendant to all persons to come there to get or deposit mail there, or to ascertain if there was any mail matter for them. We may also assume that the preparation of its tracks and grounds, and the regular use of them made by the defendant, was equivalent to an invitation to persons to cross where the plaintiff's intestate was going if they had business at the post office. Without considering the evidence relied upon by the plaintiff to show negligence on the part of the defendant's servants, we may inquire whether the plaintiff has introduced any evidence that his intestate was in the exercise of due care. She was going across the defendant's grounds in a place which was

and that it was for the jury to determine the question of negligence.

See *DEBBINS v. OLD COLONY R. R. Co.*, 154 Mass. 402 (1891), where an intending passenger was struck by a locomotive at a grade crossing near a railroad station, and it was held that direction of verdict for defendant was proper on the ground of negligence of plaintiff. Distinguishing the case from the *Copley* case, it being held that plaintiff was not acting under any excitement which might have caused a misjudgment as in that case. (See preceding paragraph.)

See also *WRIGHT v. BOSTON & ALBANY R. R. Co.*, 142 Mass. 296 (1886), girl between six and seven years of age walking on track and struck by freight cars; pathway on track not an invitation to public to use same as public way; verdict for defendant and judgment rendered thereon.

See also *JOHANSON v. BOSTON & MAINE R. R. Co.* and *FLEMING v. BOSTON & MAINE R. R. Co.*, 153 Mass. 57 (1891), four actions of tort, two being brought by each plaintiff, as administrator, for causing the death of his child at a crossing of the defendant's railroad in Malden, and the other two cases by each individually for the loss of the services of the children, and for their funeral expenses, respectively. The cases were tried together in the Superior Court, before BARKER, J., who directed a verdict in each case for the defendant, and allowed a bill of exceptions. The court (per HOLMES, J.) held that there was evidence for the jury that the crossing was a highway within the Pub. Stat. c. 112, §§ 163-165, rendering railroad company liable if it failed to give warning of approach of train at crossing as prescribed by statute, and that it was for the jury to determine whether such warning was given. Plaintiff's exceptions sustained.

used more or less for switching and making up freight trains. The evidence tended to show that many persons were accustomed to go there in passing from the westerly part of the village to the passenger station. There was also uncontradicted testimony from several witnesses that, when a freight train was left standing there for a considerable time, the trainmen were accustomed to divide the train, and thus make an opening through which persons could walk in going to and from the station. The plaintiff's intestate was a girl of thirteen years of age, who lived near by, and was familiar with the place. She started to go to the post office with two boys, one of whom had a wheelborrow. As the three approached the defendant's grounds, there was a freight train standing upon one of the tracks, with an opening in it between two cars, nearly in usual line of travel to the shed and platform used by passengers, and to the passenger station beyond on the opposite side of the main tracks. The length of the train was not stated by any witness, but one of the boys speaks of box cars, and says he did not see the locomotive. From the plan which was used at the trial, and from the explanation of it at argument before us, we infer that there was a considerable distance between the opening in the train and the locomotive. The plaintiff's counsel, in his brief, says that the train was a long one. The boys passed through this opening between the cars, which was about six or eight feet wide. She followed, and, as the forward part of the train backed up, she was caught between the cars, and killed. Everybody of ordinary intelligence about to pass through a narrow opening in a freight train standing in a freight yard knows that the cars are liable to be moved, and that care must be exercised in view of that possibility. As it is established law that a passenger on a highway about to cross a railroad is bound to look and listen for approaching trains, if he would exercise ordinary care, so one approaching a long train of cars in a freight yard, through which he sees a narrow opening, cannot justify himself in passing through the opening without looking up to see whether the cars on either side are in motion. In the present case, only one witness said anything in regard to the conduct of the plaintiff's intestate immediately before the accident. He testified that, "just as the cars started, she started to run." In another part of his testimony, he said he could not tell whether she was running or walking, but, as the cars started, she came in there, and was caught. There is no evidence in the

case tending to contradict this testimony, and the irresistible conclusion from it is that while the cars were in motion, and when there was a space of only six or eight feet between the two cars, she tried to pass through. It would be impossible for one in the exercise of due care to attempt this without seeing that the cars were in motion, and it was careless for one to try to pass through, knowing that they were in motion, when the opening was so narrow that he was liable to be caught. No emergency is shown which would justify her in taking any risk. This undisputed evidence receives the strongest possible confirmation from other proved facts. Everybody knows that it is physically impossible for a long freight train to back up in such a way as to move the rear car suddenly and quickly, without giving warning of what is to be expected by the previous movement of the locomotive and the cars near it. The burden was upon the plaintiff to show that his intestate was not careless in exposing herself to danger unnecessarily, and we find no evidence in the case that tends to sustain this burden.

Exceptions overruled.

## MATTA, ADMINISTRATRIX, V. CHICAGO AND WEST MICHIGAN RAILWAY COMPANY.

*Supreme Court, Michigan, January Term, 1888.*

[Reported in 69 Mich. 109.]

**DRIVING ACROSS TRACK AT CROSSING AND STRUCK AND KILLED BY TRAIN AT CROSSING — CONTRIBUTORY NEGLIGENCE.** — In an action to recover damages for death of plaintiff's intestate, who was killed by defendant's train at a highway crossing while driving across the track, it appeared that the deceased did not look for any approaching train until his horse was on the track, when he looked at the ringing of the bell at the cattle guard announcing the approach of a train, and whipping up his horse, he attempted to cross, but was too late and was struck by the train; that deceased was familiar with the situation of the crossing; that signals of approach of train were given, although none of plaintiff's witnesses heard same until the cattle guard was reached. *Held*, that direction of verdict for defendant was proper, the plaintiff's intestate being guilty of contributory negligence.

**TRAVELERS AT CROSSING — LOOKING AND LISTENING.** — It is the duty of persons approaching a crossing to look and listen before venturing upon it (1).

1. "Stop, Look and Listen." — See NOTE ON THE RULE OF STOP, LOOK AND LISTEN, 9 AM. NEG. REP. 408-416.

In *Grostick v. Detroit, etc., R. R. Co.*, 90 Mich. 594, it was held "that a person about to cross a railroad track is bound

## FAILURE TO SIGNAL NO EXCUSE FOR CONTRIBUTORY NEGLIGENCE.

— Mere neglect of railroad company to give signals at country crossing does not excuse contributory negligence of traveler (1).

ERROR to Berrien. From verdict for defendant the plaintiff brings error. The facts appear in the opinion. *Judgment affirmed.*

A. H. POTTER (C. B. POTTER, of counsel), for appellant.

SMITH, NIMS, HOYT & ERWIN, for defendant.

**Morse, J.** — The plaintiff brought suit for damages resulting from the death of her intestate, who was killed upon a highway crossing known as the "Plee Crossing," in the township of Lincoln, Berrien county.

The declaration alleged negligence in the defendant's failure to give any notice or warning of the approach of its train to such crossing, either by sounding a whistle, ringing a bell, or otherwise.

The evidence of the witnesses for the plaintiff was that none of them heard any whistle sounded or bell rung until the train struck the cattle guard at the crossing.

The accident was witnessed by James G. Collins, William Singer, Frank Crane, and Anna Matta, a daughter of deceased, and also by some of the employees of the defendant.

The testimony of plaintiff's witnesses disclosed the circumstances of the killing of Mr. Matta, as follows: The crossing is a mile or so north of the village of Stevensville. Eighty rods north of this crossing is another, known as the "Miller Crossing." The highway at the Plee Crossing runs nearly north and south. The railroad track crosses the highway diagonally, running north-east and southwest. About five rods north of the crossing, and

to recognize the danger, and to make use of the senses of hearing and sight, and to ascertain, before attempting to cross, whether a train is in dangerous proximity. If he neglects to do this, and ventures blindly upon the track, it must be at his own risk, and such conduct should be pronounced negligence by the court as matter of law." In that case the declaration alleged, and the plaintiff's evidence tended to show, that the defendant was guilty of negligence in not continuously giving signals for forty rods before reaching the crossing, as the statute required.

See also *Gardner v. Detroit, etc., R. Co.*, 97 Mich. 240.

1. In *Penn. R. R. Co. v. Righter*, 42 N. J. L. 180, the New Jersey court holds that the failure of the railroad company to give signals will not relieve the traveler from his duty of looking and listening before crossing track. (See the *RIGHTER* case reported with the New Jersey cases in this volume, *post.*)

See also numerous cases on this point reported in vols. 11 and 12 AM. NEG. CAS.

on the east side of the highway, lying between the road and the railroad, is a cemetery, running about thirty-five rods along the highway. At its base at the north end, the cemetery is about seventeen rods in width; at the south end it comes nearly to a point. It was filled quite thickly with oak grubs or young oak trees, most of them from ten to twelve feet high, and bushy. The accident took place in the winter time, January 2, 1885, and some of the leaves had fallen from the trees.

On the day in question a passenger train, going south, was due about four o'clock in the afternoon. This train did not stop at Stevensville, and was one of the fastest on the road. It was behind time about fifty minutes, and was running at the rate of forty-five miles an hour. None of the plaintiff's witnesses heard any whistle sounded or bell rung at Miller's Crossing, or at the Plee Crossing, until the cattle guard was reached.

Matta was going south, driving one horse, at a pretty fair gait, attached to a light wagon. He was sitting on a platform of boards, reaching from bolster to bolster of his wagon. His face was to the west, his back to the approaching train, and his feet hanging off on the west side of the platform. It was very cold, and the ground was frozen hard. The train made but little noise in running. His head was down, and he did not look up while any one saw him until the feet of his horse were on the iron of the track. He looked up at the ringing of the bell at the cattle guard. He whipped up his horse, but it was too late. The engine struck the wagon between the wheels, about in the center, and carried it with the train, until it stopped about eighty rods from the crossing.

The deceased was a German, a small fruit farmer, and was familiar with the situation of the crossing and its relation to the railroad track, having lived about three years within a mile of the crossing, and passing over it almost daily.

Were it not for the trees in the cemetery the approaching train could have been seen plainly all the way from above the Miller Crossing, and all the witnesses did see it, and all but one testified that they could see it easily enough when it was passing behind the cemetery, the trees not being thick enough to obscure the view. Matta was seen by some of the witnesses as he drove from the north end of the cemetery to the track. He did not look up or change his position until his horse struck the railroad track.



On the part of the defense the engineer and fireman testified that the whistle was blown for the Plee Crossing, sixty rods from it, and that the bell was rung from that point until the crossing was reached. They were corroborated by the evidence of the mail agent and a telegraph line repairer, who were on the train.

The engineer and fireman state that they did not see Matta until he was about the length of his horse and wagon from the track, and that he was hit almost at the instant they saw him.

The Circuit judge instructed the jury to find for the defendant, on the ground that the undisputed evidence showed that the plaintiff's intestate was guilty of contributory negligence.

Under the decisions of this court the Circuit judge was clearly authorized to make this ruling.

We have repeatedly held, in harmony with the general current of authority in the United States, that a railroad track is, in itself, a notice and warning of danger, and that it is the duty of persons approaching a crossing to look and listen before venturing upon it. *Mynning v. Detroit, L. & N. R. R. Co.*, 59 Mich. 257, 64 Mich. 93; *Haas v. Grand Rapids, etc., R. R. Co.*, 47 Mich. 407; *Pzolla v. Mich. Cent. R. R. Co.*, 54 Mich. 273; *Potter v. Flint & P. M. R. R. Co.*, 62 Mich. 22; *Rhoades v. Chicago & G. T. R'y Co.*, 58 Mich. 263 (1).

It is claimed by the counsel for plaintiff that the employees of the defendant were, under the plaintiff's showing, guilty of such gross negligence "as to exclude the conception of a contributory degree." The doctrine of comparative negligence does not prevail in this State. See *Mynning v. Detroit, L. & N. R. R. Co.*, 59 Mich. 260, and cases there cited.

The counsel further assume that if the engineer and fireman had obeyed the statute and sounded the signals, the disaster to Matta would not have happened.

Admitting this to be true, it is equally as probable or certain that if Matta had been exercising due care, and had looked out for the train at any time within forty rods of the track, the accident would not have taken place. Therefore, if the plaintiff's evidence be taken alone, and considered as true, both the plaintiff's intestate and the employees of the defendant were at fault and the plaintiff could not recover.

1. The cases cited in the opinion in the case at bar are reported with the Michigan cases in this volume of *Am. Neg. Cas.*, *post*.

There are cases where the person injured or killed may have been negligent, yet, if the employees of the railroad company are wanton, wilful, or reckless in the premises, the contributory negligence of such person will not prevent a recovery for the injury. See *Bouwmeester v. Grand Rapids, etc., R. R. Co.*, 63 Mich. 557, and cases there cited, and 67 Mich. 87; *Ecliff v. Wabash, St. L. & P. R'y Co.*, 64 Mich. 196.

But the mere neglect to give signals at a country crossing is not considered such gross negligence as to destroy the ordinary legal effect of contributory negligence upon the plaintiff's case. See *Mynning v. Detroit, L. & N. R. R. Co.*, 64 Mich. 104.

The judgment of the court below is affirmed, with costs.

## GRAND RAPIDS AND INDIANA RAILROAD COMPANY v. MARTIN.

*Supreme Court, Michigan, October Term, 1879.*

[Reported in 41 Mich. 667.]

**PERSON INJURED WHILE DRIVING ACROSS PASSAGEWAY ON TRACK OPENED BY RAILROAD COMPANY — INVITATION.** — In an action to recover damages for injuries sustained by plaintiff while driving close to defendant's depot, caused by collision with a car struck by a freight train, where it appeared that plaintiff was driving through an open way or passage, opened for the purpose by defendant, with a load of potatoes for the cars, plaintiff being lawfully there, and a car which was standing on the track was struck by a freight train causing the car to be pushed off the track and collide with plaintiff's wagon, it was held that there was sufficient evidence to show negligence on defendant's part and freedom from contributory negligence on part of plaintiff, and to justify verdict for plaintiff.

**ERROR to Kalamazoo.** Trespass on the case. From judgment for plaintiff for \$550, defendant brings error. The case is stated in the opinion. *Judgment affirmed.*

HUGHES, O'BRIEN & SMILEY, for plaintiff in error.

HENRY C. BRIGGS, for defendant in error.

**Campbell, Ch. J.** — Martin recovered a judgment of \$550 damages against the railroad company for injuries suffered on their depot grounds at Kalamazoo by reason of having the wagon in which he was approaching the depot struck by a car driven from the place where it had been standing, by a freight train violently driven against it.

Martin was at the time driving through an open way or passage

opened for that purpose by the company, and was conveying another person with several bushels of potatoes to the cars. The passage was not at any place crossed by tracks, but car tracks were laid up to it on either side and were not protected by posts or other defenses. Under the charge of the court the jury must have found that Martin was there in a lawful and usual way and at a proper time and on a proper errand. The car which struck him was when he drove it standing on the track close to the passage. If it was protected in any way it was by brakes which gave way. It was struck by a freight train propelled by a locomotive, and was driven forcibly enough to destroy the brake fastening if it had one, and to push it from the track so that it went against Martin's wagon and moved it on about the car's length, badly injuring Martin himself and breaking his vehicle. His business was making gloves and lashes, and his own part in the business was chiefly attending to cutting the gloves and seeing to the tanning, and mixing the tanning materials. His witnesses testified to serious bodily injuries producing continued effects and interfering with the conduct of his affairs.

There are several assignments of error, but the points involved are few and simple. The charge was very carefully guarded and extremely fair, and for most of the points presented there is not much occasion for discussion.

Several assignments rest on a claim that plaintiff was guilty of contributory negligence and could not recover. The jury found that he was not, and we cannot discover any reason to doubt the justice of their conclusion. Certainly there was nothing entitling plaintiffs in error to have this taken from the jury. It cannot be necessarily negligence for a person who is by the invitation of a railroad company going over an open passage prepared for that very purpose to give access to their depot, to assume it will be safe. No one is bound to imagine that cars will be driven where there is no car track on a passage way which he is expected to use with his wagon. He has a right to expect that the utmost care will be used to protect passers on such a road, and that the company will use effectual measures to prevent the likelihood of any such danger. The court charged with sufficient fullness upon the care required of all persons to avoid danger in such places, and put the case to the jury quite as strongly as was proper. If the road had run across a track over which cars were run frequently or habitually, a different rule of diligence would

prevail for very obvious reasons. But the law does not require men to be on a constant lookout for dangers that cannot be expected to exist so long as there is ordinary care used by those whose action is the only thing that can cause danger.

We cannot accede to the claim that there was no evidence of negligence on the part of the railroad company. It was very plainly their duty to make it at least reasonably certain that cars should not run across the passage way. They were bound to prevent it by posts or some other obstacle, or else to adopt some other adequate arrangement to hold the cars from moving beyond the end of the rails. And they were bound to prevent such carelessness in their train drivers as would run the trains themselves over the line or drive others there. It certainly may be negligence to produce such results, and while we are not concerned in the present case to consider whether it can usually be anything else, it is enough that the jury on the facts have found there was negligence. The criticism on the pleadings that claims evidence could not be received which showed that Martin as well as his wagon was struck, requires no comment.

We think it was competent to give such a full account of plaintiff's business as to show how far he was affected in it, and this could not be done without showing its nature and extent. There was no evidence received as a ground of damage beyond his pecuniary loss by reason of the suspension of his personal oversight and labor. There was no error in this regard.

The objection that a physician cannot reveal with his patient's consent what he has learned during his treatment, is one which if valid would render it impossible in either civil or criminal cases to use the only testimony which would show the nature and extent of disease. The statute is one passed for the sole purpose of enabling persons to secure medical aid without betrayal of confidence. It is only a question of privilege, and such communications are on the same footing with any other privileged communications which the public has no concern in suppressing when there is no desire for suppression on the part of the persons concerned.

No reason has been suggested why the opinions asked of and given by the physicians were not within such limits as are admissible. They appear to us to be confined strictly to medical inferences from hypothetical facts presented for their consideration and based on testimony. They were properly received.

It is claimed that while the court informed the jury that they would be justified in disregarding the testimony of witnesses who wilfully swore falsely, there was error in not specifically instructing them in the same way concerning wilful exaggeration. We do not understand how wilful exaggeration is anything but wilful false swearing, and it is reasonable to suppose both court and jury would understand that they were the same. But it is well to suggest that while these cautions are very proper cautions, they belong to fact and not to law. So long as juries must determine for themselves what force to give to testimony and are not bound to reject testimony entirely, even though they believe some of it wilfully false, such suggestions must be very guarded or they may become erroneous and misleading. Courts are not compelled to dwell upon or enlarge upon them. We do not see how any further cautions could be reasonably asked than were given.

We discover no other points which deserve serious consideration. The charge is extremely fair throughout and the case presents no appearance of having been attended by any improper surroundings. Such cases are sometimes affected by considerations which it would be desirable but is not easy to avoid. In the present case we think there is no reason to complain of anything appearing in the record, and the result gives no reason to suppose that the jury did not rightly understand the law laid down.

The judgment must be affirmed with costs. All concur.

PERSON DRIVING KILLED IN COLLISION BETWEEN WAGON AND TRAIN AT CROSSING — SIGNAL BY FLAG-MAN — QUESTION FOR JURY. — In *STEELE v. CHICAGO & GRAND TRUNK R'Y CO.*, 107 Mich. 516 (*December Term, 1895*), accident at railroad crossing, judgment for plaintiff was affirmed, the syllabus to the official report stating the case as follows: "In an action for the death of plaintiff's intestate, caused by a collision at a railroad crossing, the testimony tended to show that a freight train had parted near the middle, apparently without negligence on the part of the defendant; that the flagman stationed at the crossing, after the first section of the train had passed, signaled that the track was clear; that the deceased thereupon attempted to drive across the track, and was struck by the second section of the train, which was following the first at a distance of about 100 feet; that it was very dark at the time; that it was the custom to maintain

lights at the rear of a train, and that there were none upon the last car of the first section. It further appeared that the flagman had been employed at such crossing for two years, during which time no train had parted; and that, upon the occasion in question, almost immediately after giving the signal to cross, he discovered the approach of the second section, and did all that he could to prevent the accident. *Held*, that the question of the flagman's negligence was for the jury. (GRANT, J., dissented.)"

DEAF PERSON DRIVING ACROSS TRACK AT CROSSING — CONTRIBUTORY NEGLIGENCE — DUTY OF TRAVELER AT CROSSING. — In *PHILLIPS v. DETROIT, GRAND HAVEN & MILWAUKEE R'Y CO.*, 111 Mich. 274 (*December Term, 1896*), accident at railroad crossing to person driving there, judgment for defendant was affirmed, it being held that plaintiff was guilty of contributory negligence (1). The court (per LONG, Ch. J.) said: "This action is brought to recover damages for an injury to the plaintiff by a passenger train at a highway crossing on the defendant's road. On Sunday, June 4, 1893, a washout had occurred on the Chicago and Grand Trunk Railroad, between Lansing and Durand, so that the through passenger train from Chicago eastward was taken from Lansing to Ionia, thence eastward to Durand, over the defendant's road, passing through the village of Muir, where the accident happened. The train passed the station at Muir, without stopping, a little past noon, running at a rapid rate of speed, the witnesses varying in testimony in regard to it; some stating the rate as high as forty-five miles an hour, and others about twenty miles. It was an irregular excursion train. Three blocks east of the depot, and about 1,170 feet distant, the train passed over Plain street at grade. The plaintiff, a man about sixty-seven years of age, quite deaf, lived at Portland, about seven miles from Muir, and on that morning, traveling from his home to Carson City, passed through the village of Muir. He entered the town from the south side on Prairie street, and turned eastward into Superior street, which is parallel with the track of defendant's road, and about 200 feet distant from it. He traveled along Superior street about 1,170 feet, when he turned northward into Plain street. No train was in sight when he turned into Plain street. He was riding in a single carriage, with the top up, and side curtains off, drawn by one horse, which was gentle and steady. Driving northward along Plain street, his view was for the most part obstructed, first by a dwelling house,

1. *Collisions at Crossings.* — See note, at end of this case, of Michigan cases relating to accidents to persons while driving across railroad tracks.

then by some bushes, a hen house, and a pile of ties, the ties extending up to within six or eight feet of the railroad track. The hen house was about six feet high, and the ties, at the utmost, were only nine feet high. The plaintiff did not stop his horse, but drove along to a point past the pile of ties, when, looking westward, he saw the train approaching, and about seventy feet distant from him. His horse was then upon the track. He drove across, and the train caught the carriage, overturning it, and injuring the plaintiff severely, as well as damaging his horse and carriage. The negligence charged is: 1. That the defendant, by allowing the ties to remain there, and obstruct his view, led him into a place of danger; 2, that it failed to provide a watchman; 3, that the train was running at an unlawful rate of speed, and without sounding the bell or whistle; 4, that the defendant had no right or authority to run the train on Sunday. At the close of the case, the court below directed verdict and judgment in favor of the defendant. Plaintiff brings error.

"From the record it is apparent that the plaintiff took none of the precautions which the law requires of one who is about to cross a railroad track. Some claim is made that Stoddard, who was in advance of the plaintiff, passed over the track in safety, and that the plaintiff had the right to rely upon that fact, and was thereby not required to take the same precaution which he otherwise would; but it appears that Stoddard was greatly in advance of plaintiff, and had turned the corner off Plain street, a distance of nearly 175 feet, before the plaintiff reached the crossing: and it does not appear that plaintiff in any manner relied upon the fact that Stoddard had passed safely over. *Jensen v. Mich. Cent. R. R. Co.*, 102 Mich. 176; *Houghton v. Chicago, etc., R'y Co.*, 99 Mich. 308. The plaintiff, if he could not see an approaching train by reason of these obstructions, was bound to use greater precautions in nearing the track. A person about to cross a railroad track is bound to recognize the danger, and to make use of the sense of hearing as well as of sight, and, if either sense cannot be rendered available, the obligation to use the other is stronger, to ascertain, before attempting to cross, whether a train is in dangerous proximity; and if he neglect to do this, but ventures blindly upon the track, without any effort to ascertain whether a train is approaching, it must be at his own risk. This is the general rule settled in this state, but modified by the proposition that he is not bound to the same degree of care where he has no reason to expect a train to pass at that time. *Lake Shore, etc., R. R. Co. v. Miller*, 25 Mich. 274; *Guggenheim v. Lake Shore, etc., R. R. Co.*, 66 Mich. 150. But the law requires a person

to exercise a great degree of care in making these crossings. The track itself is a warning of danger; and, if one goes upon it heedlessly, he assumes the risk incident thereto. Here the plaintiff was quite deaf. It is apparent that he could not hear the noise of the train. He knew the track was there; was familiar with the road. He could not see because of these obstructions, and yet he did not stop or take any other precaution to ascertain if a train was approaching. He had no right to rely upon the fact that it was Sunday, and that no train was likely to approach, and drive blindly on. He must exercise some care. We are unable to find that he exercised any, even the slightest, care. If he had stood up in his carriage, and looked westward, he could have seen over the hen house and the pile of ties, and have seen the train while it was some 1,200 feet away. He did not stop, and, if he had, he was, it appears, too deaf to hear the rumbling of the train. The case, it seems to us, is one where the plaintiff was so manifestly guilty of contributing to his own injury that a recovery should not be permitted. In *Shufelt v. Flint, etc., R. R. Co.*, 96 Mich. 327, it appeared that, if Mrs. Shufelt had stopped eighteen or twenty feet from the crossing, she could have seen the train. Mr. Justice Hooker in that case, speaking for a majority of the court, said: 'It was her duty to look both ways after getting where she could see before venturing upon the track, and she should have taken sufficient time to do so, though it became necessary to stop her team for the purpose. \* \* \* A person is not justified in driving upon a track in the face of an approaching train without looking for it, and obstructions to the view in proximity to the track increase the obligation of extreme caution' (1). The present case, upon its facts, shows more clearly the obligation resting upon the plaintiff, for not only was his view obstructed, but he was very deaf. Whatever view may be taken of the testimony, giving it all the attitude claimed by counsel for plaintiff, it is difficult to find in it any proof of care or caution taken by plaintiff, as he ran blindly into danger.

"The contention of counsel that this was a Sunday excursion train, and unlawfully run, we think, can have a bearing only upon the question as to whether the plaintiff would not be required to exercise the same care in making the crossing. If he was not expecting a train, or had a right to assume that no train ever ran on Sunday over that road, and he was relying upon that fact, it might, in a sense, excuse him from that degree of care that otherwise he was bound to exercise. But it is apparent from the record that, had

1. The cases cited in the opinion in the case at bar are reported with the Michigan cases in this volume of *AM. NEG. CAS.*



the plaintiff had that in view, he did not take the precautions which the law requires, for even under such circumstances he had no right to go blindly upon the track. But, though it is the exception on that road to run Sunday trains, yet excursion trains frequently go over the road on Sunday. The judgment must be affirmed. The other justices concurred."

NOTE OF MICHIGAN CASES RELATING TO COLLISIONS AT CROSSINGS BETWEEN TRAINS AND VEHICLES.

Among the cases decided in Michigan arising out of accidents at crossings caused by collisions between trains and vehicles, etc., see the following:

*Driving across track — Person riding injured in collision — Looking and listening.*

In *LAKE SHORE & MICHIGAN SOUTHERN R. R. Co. v. MILLER*, 25 Mich. 274 (1872), collision between train and wagon in which plaintiff was riding, judgment for plaintiff was reversed on the ground of erroneous instructions as to plaintiff's negligence and burden of proof. It was held that negligence on the part of the person owning and driving the team attached to the wagon in which plaintiff was riding, affects plaintiff's right to recover equally with her own negligence. *Held*, also, that failure of person to use his senses to avoid threatened danger in crossing railroad track, is negligence. *Held*, also, that the absent-mindedness of a person is no excuse for failing to look to see or stop his wagon to hear whether a train was approaching crossing. The court (per CHRISTIANCY, Ch. J.), discussed the questions at issue at some length, citing numerous authorities on the points decided.

*Doctrine of comparative negligence does not prevail in Michigan.*

In the *MILLER* case (preceding paragraph), it was held that the doctrine of comparative negligence did not prevail in Michigan. Citing *WILLIAMS v. MICHIGAN CENTRAL R. R. Co.*, 2 Mich. 259 (1851), an action for damages for killing of plaintiff's horses by defendant's train, where it was held that "it is a well-settled principle of law that where an injury of which a plaintiff complains is the result of his own negligence or fault, or of the negligence or fault of both parties, without intentional wrong on the part of the defendant, no action can be maintained."

*Contributory negligence.*

As to the rule as to contributory negligence and the non-recognition of the doctrine of comparative negligence, see also *DETROIT & M. R. R. Co. v. VAN STEINBURG*, 17 Mich. 119; *MICH. CENT. R. R. Co. v. COLEMAN*, 28 Mich. 274; *HAAS v. GRAND RAPIDS & I. R. R. Co.*, 47 Mich. 408; *WOOD v. DETROIT CITY R. R. Co.*, 52 Mich. 402; *PZOLLA v. MICH. CENT. R. R. Co.*, 54 Mich. 273; *PALMER v. DETROIT, L. & N. R. R. Co.*, 56 Mich. 1; *HATHAWAY v. MICH. CENT. R. R. Co.*, 51 Mich. 253.

*Driver of wagon killed in collision with train at crossing — Contributory negligence.*

In *HAAS, ADM'R, v. GRAND RAPIDS & INDIANA R. R. Co.*, 47 Mich. 401 (1882), judgment for defendant was affirmed, the syllabus to the official report stating the case as follows: "A team collided with a railway train at a road crossing, and the driver was killed. The railroad and the highway were both below the general surface of the ground, and an approaching train could only be seen

occasionally by one driving towards the crossing. The driver was familiar with the crossing, but except that he checked his team for a moment, some four rods from the crossing, he did not appear to have observed any precaution. The engine whistle was duly sounded when the crossing was approached. *Held*, that the driver of the team was chargeable with negligence directly contributing to the collision and that no action would lie by his administrator against the railroad company."

*Defective approach to crossing — Liability of railroad company.*

In *MALTBY v. CHICAGO & WEST MICHIGAN R'Y CO.*, 52 Mich. 108 (1883), where plaintiff, while driving a load of hay and passing over defendant's track at a crossing, was injured by his load upsetting due to alleged unsafe condition of approach to the crossing contiguous to the rail, judgment for defendant was reversed, it being held that "a railroad company crossing a public highway is bound to keep the approaches to the crossing in safe condition for travelers on the highway."

*Failure to look and listen at crossing — Collision between wagon and train — Contributory negligence.*

In *RHOADES, ADM'X v. CHICAGO & GRAND TRUNK R'Y CO.*, 58 Mich. 263 (1885), where plaintiff's intestate while driving across defendant's track was struck and killed at the crossing, judgment for defendant was affirmed, plaintiff's intestate being guilty of contributory negligence in failing to look for train while approaching crossing.

*Collision between sleigh and train at crossing — Contributory negligence.*

In *POTTER v. FLINT & PERE MARQUETTE R. R. CO.*, 62 Mich. 22 (1886), collision at crossing between sleigh and train, judgment for defendant was affirmed, it being held that plaintiff was guilty of contributory negligence. "It is the duty of all highway travelers to keep a due look-out."

*Driving across track and struck by train — Duty of traveler.*

In *GUGGENHEIM, ADM'X v. LAKE SHORE & MICHIGAN SOUTHERN R'Y CO.*, 66 Mich. 150 (1887), person driving across track struck and killed at crossing, judgment for plaintiff was affirmed. For the facts in the case see previous decision reported in 57 Mich. 488 (1885), where judgment for defendant was reversed, it being held that the case was for jury and direction of verdict for defendant was error.

In the Guggenheim case (*supra*), it was held that "while it is the duty of a traveler before crossing a railroad track, under *all* circumstances, to look and listen for an approaching train, he is not bound to the same degree of care where no train is due, and he has no knowledge of its approach, as when these conditions confront him."

*Driving across track — Failure to look and listen — Contributory negligence.*

In *GUTA v. LAKE SHORE & MICHIGAN SOUTHERN R'Y CO.*, 81 Mich. 291 (1890), collision between wagon and train at crossing, it was held that "plaintiff was guilty of contributory negligence in attempting to cross a railroad track without looking to see if a train was approaching, his opportunities being as good for seeing the train as those of witnesses who saw plaintiff drive upon the track when the train was approaching, as if it were not coming," and judgment for defendant was affirmed.

*Engine and wagon colliding at crossing — Negligence for jury.*

In *THOMAS v. CHICAGO & GRAND TRUNK R'Y Co.*, 86 Mich. 496 (1891), engine colliding with plaintiff's wagon at highway crossing, judgment for plaintiff was reversed, it being for the jury to determine question of negligence of parties.

*Lumber wagon struck by train at crossing and driver killed — Contributory negligence — Duty of travelers at crossing.*

In *GROSTICK, ADM'X, v. DETROIT, LANSING AND NORTHERN R. R. Co.*, 90 Mich. 594 (1892), where plaintiff's intestate, while driving a lumber wagon, was struck and killed by defendant's train at a crossing, judgment for plaintiff for \$18,143.50 was reversed on the ground of contributory negligence of the deceased. It was held that "a person about to cross a railroad track is bound to recognize the danger, and make use of the senses of hearing and sight and to ascertain, before attempting to cross, whether a train is in dangerous proximity. If he neglects to do this, and ventures blindly upon the track, it must be at his own risk, and such conduct should be pronounced negligence by the courts, as matter of law." (Citing numerous cases which will be found reported with the Michigan cases in this volume of AM. NEG. CAS.)

In the *GROSTICK* case, *supra*, *LONG, J.*, discussed the question of duty of travelers at crossings at some length,, citing numerous authorities on the subject.

*Running train or street car without headlight — Collision with vehicle.*

In *VAN AUKEN v. CHICAGO & WEST MICHIGAN R'Y Co.*, 96 Mich. 307 (1893), collision of wagon with train running in open country without headlight on dark night at crossing, judgment for plaintiff was affirmed.

See also *RASCHER v. EAST DETROIT & G. P. R'Y Co.*, 90 Mich. 413, as to question of headlights on street car.

See also *McGEE v. CONSOLIDATED STREET R'Y Co.*, 102 Mich. 107 (1894), as to failure to provide headlights on electric street cars, an action for damages for injuries sustained by plaintiff who was run over by one of defendant's street cars as he was crossing track. Judgment for plaintiff reversed on ground of negligence in failing to look both ways at crossing before attempting to cross track.

*Collision at crossing — Failure of driver of wagon to stop to look and listen for trains — Contributory negligence.*

In *SHUFELT v. FLINT & PERE MARQUETTE R. R. Co.*, 96 Mich. 327 (1893), judgment for defendant was affirmed, the syllabus to the official report stating the case as follows: "The plaintiff's wife is held to have been guilty of such negligence in failing to stop her team, and look and listen for an approaching train before attempting to cross defendant's track, as to bar a recovery, it appearing that had she done so she could have seen the train when she was at a distance of from eighteen to twenty feet from the crossing."

*Collision at crossing — Contributory negligence.*

In *HOUGHTON v. CHICAGO & GRAND TRUNK R'Y Co.*, 99 Mich. 308 (1894), collision between wagon and train at crossing, judgment for plaintiff was reversed on the ground of contributory negligence.

*Failure to look and listen for train — Contributory negligence.*

In *JENSEN v. MICHIGAN CENTRAL R. R. Co.*, 102 Mich. 176 (1894), collision between wagon and train at crossing, judgment for defendant was affirmed, on

ground of plaintiff's contributory negligence in failing to stop his team to listen for approaching train before crossing track.

See NOTE upon the DUTY OF LOOKING AND LISTENING AT RAILROAD CROSSINGS, appended to *JENSEN v. MICHIGAN CENTRAL R. R. Co.*, 102 Mich. 176, 181-188, in which the Michigan cases relating to the rule are reviewed.

In *TOBIAS v. MICHIGAN CENTRAL R. R. Co.*, 103 Mich. 330 (1894), where plaintiff's husband, while driving his horses and wagon on a public highway where it crossed defendant's tracks was struck and killed by one of defendant's trains, judgment for plaintiff was reversed on ground of contributory negligence of deceased in failing to look for approaching train.

*Horse and carriage destroyed in collision with train at street crossing — Contributory negligence — Flagman at crossing.*

In *FREEMAN v. DULUTH, SOUTH SHORE & ATLANTIC R'y Co.*, 74 Mich. 86 (1889), collision with carriage and train at street crossing, judgment for plaintiff was reversed. The court said: "The company was at fault in not having a flagman and he [plaintiff's driver] was at fault in being careless and reckless in his driving, without looking, as he ought to have looked. His fault contributed to the injury and plaintiffs cannot recover unless the defendant was guilty of such reckless negligence in the premises that the question of contributory negligence cannot arise in the case." It was held that there was no gross negligence on part of defendant, and verdict should have been directed in its favor.

*Flagman at crossing — Statute.*

In *BATTISHILL v. HUMPHREYS*, 64 Mich. 494, 511, it was held, under the pleadings and testimony in the case, that the absence of a flagman at a crossing (the place of the accident) could not be considered negligence in the railroad company, as the railroad commissioner had not determined the necessity to maintain one there. But nothing was said, or intended to be said, in that opinion that there could be no negligence, in any case, in not maintaining a flagman at a street crossing unless such commissioner had ordered one to be stationed there. See the *FREEMAN* case (preceding paragraph), in which the case of *Battishill v. Humphreys*, *supra*, is thus commented upon.

*Horses and vehicle injured in collision with train.*

In *FROST v. MILWAUKEE & NORTHERN R. R. Co.*, 96 Mich. 470 (1893), where horses were killed and vehicle damaged in collision with train, judgment for plaintiff reversed, on the ground that there was no gross negligence on part of railroad company, where the engineer of train did not know that plaintiff's horses were stuck fast on track and assumed that they would get off track when signals were given.

**PERSON ATTEMPTING TO LEAD HORSE OFF TRACK STRUCK AND KILLED BY STREET CAR — NEGLIGENCE OF PARTIES FOR JURY — EVIDENCE.** — In *MCCLELLAN, ADM'X, v. FORT WAYNE & BELLE ISLE R'y Co.*, 105 Mich. 101 (*April Term, 1895*), action for damages for death of plaintiff's intestate caused by being struck by defendant's street car, judgment for plaintiff was affirmed, the case being stated by *MONTGOMERY, J.*, as follows: "Decedent and a young man named Delling

were traveling along Champlain street, in Detroit, riding on a two-wheeled road cart, drawn by a colt three years old, leading another horse. They stopped in front of a residence on Champlain street, and decedent went into the house while Delling remained in the cart. The street at this place is twenty-five feet in width, and the distance from the south curb to the south rail of the street-car track is ten feet and one inch. While McClellan was on the porch of the house, Delling called to him that a car was coming. He ran out to where Delling was with the horses and cart, and the testimony offered on behalf of the plaintiff tended to show that he went directly to the horse, which was being led, and seized hold of the halter shank. The colt became frightened by the noise of the approaching car and the sounding gong, began prancing about, and wheeled upon the track. Delling sawed upon the bit, and tried to back and guide the colt from the track, but did not succeed in doing so. The deceased thereupon ran to the head of the colt, and tried to lead him off the track, but without success. Deceased then proceeded to shove the colt from the track, and while engaged in doing so was struck by the car, and received injuries resulting in his death. The defendant's testimony tended to show that the colt remained quiet until the car was within eight or ten feet, and then suddenly took one step to the track, and that McClellan at that instant stepped in front of the car, and was struck. The young man Delling, however, testifies that the car was still 100 to 125 feet distant after McClellan had gone to the head of the colt, and Miss Williams, a witness for the defendant, testified that she saw the deceased at the head of the colt when the car was twenty to twenty-five feet away. This was the first she saw of the parties. It is contended by the defendant that the evidence failed to show negligence on the part of the company, and that negligence on the part of decedent did appear. We think there was sufficient testimony from which the jury might have inferred that the situation was apparent to the motorman, and that it was his duty to bring the car under control, and that he had ample opportunity to do so after discovering the peril to decedent. We also think that the question of whether the decedent was guilty of contributory negligence was for the jury. See *Laethem v. Fort Wayne & Belle Isle R'y Co.*, 101 Mich. 297; *Montgomery v. Lansing City Electric R'y Co.*, 100 Mich. 46 (1). Exception was also taken to the refusal of the court to strike out the testimony of what appeared by a post-mortem examination of deceased. This testimony was received by the

1. See note, at end of this case, relating to Michigan cases arising out of collisions between street cars and vehicles.

court as one of the means of ascertaining what the result of the injury was, and for this purpose we think was competent. George H. Fuller, conductor of the car which inflicted the injury, and who testified to a state of facts tending to show the exercise of care on the part of the motorman, who asked on cross-examination if he had not stated, shortly after the accident, to one Mr. Therwachter, that the accident would not have happened if he had had his own motorman. He denied having made such statement. In rebuttal, Therwachter was called and permitted to testify that such statement was made to him by the witness Fuller. Error is assigned upon this ruling. Counsel contend that, at most, it would be an expression of opinion by the witness as to what was the cause of the collision. While this is in a sense true, it tended to show an admission on his part that the inexperience or want of care of the motorman was the cause of the collision, which, if true, would be inconsistent with his testimony given in chief. We are cited to no authority to sustain the position of defendant's counsel. A very similar question arose in *Beaubien v. Cicotte*, 12 Mich. 459, in which case one Dr. Smith had testified on his direct examination to the valid execution of a will and the capacity of the testator. He was asked whether he had not on a certain occasion declared that if the family should follow it up they would break the will, for it was not worth a snap of his fingers. This he denied, and testimony was admitted to show that he had made such statement. The court, speaking by Mr. Justice Campbell, said: 'We think the contradiction comes properly within the rule of impeachment. When a witness testifies on the stand that a paper was duly executed by a competent testator, his statement on another occasion that the instrument was worthless is a clear contradiction, on the very essence of the issue. \* \* \* It was in the witness's power, if he saw fit, admitting the conversation, to explain that it was a mere matter of opinion and based upon the facts sworn to on the trial.' See also *Patchin v. Ins. Co.*, 13 N. Y. 268. I think there was no error to the prejudice of the defendant and that the judgment should be affirmed." McGRATH, Ch. J., and LONG, J., concurred. HOOKER, J., dissented, in which dissent GRANT, J., concurred.

## NOTES OF MICHIGAN CASES RELATING TO COLLISIONS BETWEEN STREET CARS AND VEHICLES.

Among the cases arising out of accidents on street-car tracks, caused by collisions between street cars and vehicles, are the following:

*Collision between street car and vehicle — Obstructing right of way — Gross negligence of driver of vehicle.*

In *WOOD v. DETROIT CITY STREET R'y Co.*, 52 Mich. 402 (1884), collision between street car and vehicle on street-car track, judgment for defendant was affirmed, it being held gross negligence for a person to drive upon a street-railway track in front of an approaching street car without looking around until a collision occurs. Where the car had come to a standstill on the first collision, and plaintiff remained on the track when requested to get out of the way by defendant's driver, plaintiff's conduct was not only a wrong to defendant, but also to any persons who might then be riding in the car or awaiting its coming.

*Street car running without headlight — Collision with vehicle — Negligence of parties for jury.*

In *RASCHER v. EAST DETROIT & GROSSE POINTE R'y Co.*, 90 Mich. 413 (1892), where plaintiff, while being driven by her husband, after dark, upon defendant's track, was injured in a collision with defendant's electric car, which was running at high rate of speed and without a headlight, judgment on verdict directed for defendant was reversed on ground that question of contributory negligence was for jury.

*Collision between sleigh and street car.*

In *LAETHEM v. FORT WAYNE & BELLE ISLE R'y Co.*, 100 Mich. 297 (1894), collision between street car and plaintiff's sleigh, judgment for plaintiff for \$300 was affirmed.

*Collision between street car and wagon — Negligence of motorman.*

In *BLAKESLEE v. CONSOLIDATED STREET R'y Co.*, 105 Mich. 462 (1895), collision between street car and wagon, judgment for plaintiff was reversed on the ground that trial court did not properly charge upon the question of plaintiff's contributory negligence. Upon the second trial the case was submitted to the jury upon the theory stated by the Supreme Court, and judgment was rendered for plaintiff, which, on appeal by defendant, was affirmed.

See subsequent decision in the *BLAKESLEE* case, in 1 AM. NEG. REP. 627 (1897), where the syllabus states the case as follows: "Where it appeared that the driver of a wagon that was so loaded with barrels that he could not see behind it without leaning to one side, pulled in towards the street-car track in order to pass a carriage standing by the curb, without attempting to look behind, and the barrels were struck by an electric car that came up behind and frightened the horses, causing them to run away, and the driver was injured, and there was evidence that the wagon traveled thirty-five feet within line of the car before it was struck and that the motorman when thirty feet from the wagon increased the speed of the car to six miles an hour thinking he had room enough to pass, the evidence was sufficient to warrant the jury in finding the company liable."

*Collision between street car and vehicle — Contributory negligence.*

In *FRITZ v. DETROIT CITIZENS' STREET R'y Co.*, 105 Mich., 50 (1895), collision between milk wagon and street car, judgment for defendant was affirmed on ground of contributory negligence of plaintiff.

**COLLISION BETWEEN STREET CAR AND TRAIN AT CROSSING — MOTORMAN INJURED — CONTRIBUTORY NEGLIGENCE.** — In *VREELAND v. CINCINNATI, SAGINAW & MACKINAW R. R. CO.*, 109 Mich. 585 (*June Term, 1896*), collision between street car and train at railroad crossing, the plaintiff, a motorman operating the street car, being injured, judgment on verdict directed for defendant was affirmed, it being held (as per syllabus to the official report) that "a motorman who, having stopped his car thirty-five or forty feet from a railroad crossing to see whether a train is approaching, attempts to cross the track without again looking for a train, although, from a point ten feet from the center of the track, a train might be seen for a distance of 576 feet, is guilty of contributory negligence, precluding a recovery for injuries received by a collision at the crossing."

*Collision between street car and freight train — Street-car driver killed.*

In *RICHMOND, ADM'R, v. CHICAGO & WEST MICHIGAN R'y Co.*, 87 Mich. 374 (1891), street car driver killed in collision of street car with freight train at crossing, judgment for plaintiff for \$5,313 was affirmed.

*Gates at crossing open — Presumption of safety — Street car and train in collision at crossing — Driver injured.*

In *EVANS v. LAKE SHORE & MICHIGAN SOUTHERN R. R. Co.* and another railroad company, 88 Mich. 442 (1891), driver of street car injured in collision between street car and train at railroad crossing, judgment for defendant was reversed, it being held that where crossing gates are open it is not negligence for persons to presume that the gatekeeper has properly discharged his duties, and that it was safe to attempt to cross track.

*Collision between train and flat car — Engineer injured.*

In *HEWITT v. FLINT & PERE MARQUETTE R. R. Co.*, 67 Mich. 61 (1887), where plaintiff, an engineer of one of defendant's passenger trains was seriously injured by a collision with a flat car which left the side track and ran onto the main line, judgment for plaintiff for \$22,000 was reversed for numerous errors on the trial of the case, and erroneous instructions.

*Collision between trains — Engineer injured — Contributory negligence.*

In *SKELLY v. DULUTH, SOUTH SHORE & ATLANTIC R'y Co.*, 92 Mich. 19 (1892), engineer of freight train injured in collision with another train, judgment for defendant was affirmed on ground of contributory negligence.



**LAMBECK v. GRAND RAPIDS AND INDIANA  
RAILROAD COMPANY.**

*Supreme Court, Michigan, October Term, 1895.*

[Reported in 106 Mich. 512.]

**HORSE FRIGHTENED — COLLISION WITH OBJECT ON HIGHWAY — PROXIMATE CAUSE.** — If a horse becomes frightened and beyond control, and runs away, and by reason thereof collides with an object in the highway, such fright is the proximate cause of an injury to the driver, and the only proximate cause.

Such rule applied in action by plaintiff for injuries sustained in collision of her carriage with a freight car of defendant, which was alleged to have been standing in the highway, where it appeared that the horse had taken fright and had run for a block or more, and was beyond plaintiff's control, who, although she saw the car, could not keep her horse from running against the car, and judgment directed for defendant was affirmed.

McGRATH, Ch. J., *dissented*.

**ERROR to Kalamazoo.** From a judgment for defendant upon verdict directed by the court, plaintiff brings error. The case is stated in the opinion. *Judgment affirmed.*

OSBORN, MILLS & MASTER (E. M. IRISH, of counsel), for appellant.

T. J. O'BRIEN and J. H. CAMPBELL (HOWARD & ROOS, of counsel), for appellee.

**Hooker, J.** — If a horse becomes frightened and beyond control, and runs away, and by reason thereof collides with an object in the highway, such fright is the proximate cause of an injury to the driver, in one case as much as another, whether it causes the horse to fall down an embankment, back off a bridge, attempts to jump over a train of cars entirely obstructing the highway, or run into and among a lot of railway iron in the highway. And, so far as the question of proximate cause is concerned, it is as true in a case where a horse becomes frightened without fault of the driver, and runs with a driver behind him, as where he breaks his halter and runs away by himself. In all of these cases it may be said that the fright is one cause, without which the accident might not have happened, and that the presence of the objects with which the collision occurs is another, without which it could not have happened. And if the fright is the proximate, and the object the remote, cause in one of these cases, the conclusion is irresistible that it is in all of them.

There are authorities that hold that both are proximate, as they clearly are concurring causes. See *Grimes v. Louis., N. A. & C. R'y Co.*, 3 Ind. App. 473; *North Manchester, etc., Ass'n v. Wilcox*, 4 Ind. App. 141. But the decisions of this State are at variance with this doctrine. *Beall v. Township of Athens*, 81 Mich. 536; *St. Clair Mineral Springs Co. v. City of St. Clair*, 96 Mich. 463; *Bleil v. Detroit St. R'y Co.*, 98 Mich. 228 (1). As the plaintiff's own testimony shows that her horse had run for a block or more, that she saw the car standing in the highway, but could not keep him from running the carriage against it, we must find that he was beyond control, through fright, and that this alone, under the cases cited, was the proximate cause of the accident. The judgment should therefore be affirmed.

LONG, GRANT and MONTGOMERY, JJ., concurred with HOOKER, J.

**McGrath, Ch. J.** (dissenting). — The court below seems to have considered this case as ruled by *Bleil v. Detroit St. R'y Co.*, 98 Mich. 228. In that case the horse was at large. In the class of cases cited in *Langworthy v. Township of Green*, 95 Mich. 93, which hold that a horse is not considered as beyond control that merely shies and starts, it was nevertheless, in each case, the shying of the horse that brought the vehicle into contact with the defect or obstruction. But those cases are put upon the ground that highways are constructed with reference to just such probable occurrences; that travelers thereon are entitled to an opportunity to recover control of horses who may be startled suddenly; and the defect or obstruction which adds to the danger, and does not permit of an opportunity to regain control, is regarded as the proximate cause. It seems to me that the reason for the rule exists in any case where there was a probability of regaining control had it not been for the obstruction, and that is a question for the jury. In the present case, an ordinarily

1. *Proximate cause.* — On the question of proximate cause, see *Bleil v. Detroit Street R'y Co.*, 98 Mich. 228 (1893), the syllabus to which states the case as follows: "In an action to recover for injuries to a horse caused by alleged negligence of defendant, where the horse, frightened by the falling of a window sash from an upper window of a building in front of which he was hitched, broke away, and ran into a lot of iron rails piled in the street for use in rebuilding a street-railway track, and was injured, it was held that the proximate cause of the injury was the frightening and running away of the horse." See also *La Duke v. Township of Exeter*, 97 Mich. 450, and note.

gentle horse, which plaintiff had frequently driven, was startled by the bite of a fly, and when the buggy collided with the obstruction, plaintiff had the reins still in hand. I think the judgment should be reversed, and a new trial awarded.

MAIL AGENT ATTENDING TO MAIL STRUCK BY TRAIN WHILE ON TRACK — DUTY OF RAILROAD COMPANY TO KEEP RECEIVING PLACE FOR MAIL REASONABLY SAFE — CONTRIBUTORY NEGLIGENCE FOR JURY. — In *TUBBS v. MICHIGAN CENTRAL R. R. CO.*, 107 Mich. 108 (*November Term, 1895*), mail agent while attending to mail struck by train, judgment for defendant was reversed, the facts being stated by MONTGOMERY, J., as follows: "This is an action for negligent injury. The plaintiff has for several years been employed in receiving the mail from mail trains run on the defendant road, and transporting it to the post-office at the village of Dexter. At the Dexter station the defendant's road consisted of a double track, which extended from a point a short distance east of the station, westward, at least as far as Jackson; but from the point of convergence east of and near the station there was but a single track extending eastward. The station at Dexter was a short distance south of the track. In the conduct of defendant's business western-bound trains were run on the north track, and eastward-bound trains on the south track. The passengers to and from and others having business at the west-bound trains were required to cross the south track to reach the train. The injury occurred to the plaintiff while receiving mail from the westward-bound train, which was called the 'Grand Rapids Train,' or 'No. 15.' While thus engaged, he was struck by the engine of the eastward-bound train, known as 'No. 20.' Plaintiff offered testimony that tended to show that No. 15 was due at Dexter at 6:07, and that No. 20 was due there at about 6:15; but, as it did not stop at Dexter, had no scheduled time for this station; that for some years, at least, prior to the injury, the custom was for No. 20 to approach the station under complete control of the engineer; and, if No. 15 was at the station, No. 20 stopped west of the station until No. 15 discharged her passengers, mail, and express, when No. 20 would pass through on the south track; if No. 15 had not yet reached the station, No. 20 would run past the station and wait on the south track, east of the station, until No. 15 came in, when No. 20 would pull out east. There is also testimony tending to show that No. 20 was not accustomed to pass the station east without a signal. The testimony of the plaintiff shows that he was familiar with the custom of No. 20 stopping

west of the station while No. 15 discharged and received passengers; that he had been to the train every day for years prior to the injury, and had never known No. 20 to pull up to or pass the station while No. 15 was opposite the station, discharging passengers, but, on the contrary, it was of frequent occurrence for No. 20 to stop west of the station for that purpose. On the occasion in question (September 29, 1892), plaintiff came to the depot on his usual mission, heard and saw No. 15 coming, wheeled his truck from the east corner of the station house to a point some little distance west of the station house, and a point where he was in the habit of receiving mail and express, seated himself on his truck, and awaited the arrival of No. 15. No. 15 went a little further west than was customary. The mail messenger threw off two sacks of mail, one of which rolled on the north rail of the south track. Plaintiff sprang to get it, to throw it on the truck, and, while in the act of doing so, was struck by No. 20 going east. He testifies that he did not know of the approach of No. 20; that it was his intention to throw the mail across the track, and then run up beside train No. 15, get his express, and step across to the walk, out of the way of No. 20 or any other train that came along at that time, as he supposed it would soon. The evidence tends to show that, when plaintiff was struck by No. 20, No. 15 was still in motion, just coming to a stop. There was testimony that, from a point 200 feet west of the station, the engineer of No. 20 could have seen the headlight of No. 15, 1,500 feet to the east; and it is contended that, knowing of the custom of No. 15 to stop on the north track, and of the necessity of those having business at the train, as well as passengers, to cross the south track, it was an act of negligence for train No. 20 to run between train No. 15 and the station house before the business of discharging passengers, mail, etc., was completed. The circuit judge, while expressing doubt as to the negligence of the defendant, directed a verdict on the ground that plaintiff was guilty of contributory negligence.

"In determining this question, the most favorable construction to which plaintiff's testimony is open must be given. In view of this testimony, was it negligence, as a matter of law, for plaintiff to fail to look to the west, or had he a right to rely upon defendant's train not passing over the south track while he was engaged in the manner stated? This precise question has never before been considered in this court, but cases similar have arisen in at least four other states.

"The leading case on this point is *Klein v. Jewett*, 26 N. J. Eq. 474, 5 Am. Neg. Cas. 1. In that case passengers were required

to pass over a track to reach that upon which an outgoing train awaited them. The plaintiff, on hearing the signal, approached the train he intended to take passage on, stepped from the platform to the track just as the passenger train stopped, and was making his way from the point where he first stepped on the track to the platform, between the second and last car, with his back to the east when the locomotive of a western-bound train, running on the track between the station and the standing train, struck him. Plaintiff was permitted to recover, the court saying: 'The plaintiff, in attempting to pass from the depot to the cars, in the absence of warning, had a right to regard himself in a place of safety, where he had a right to give his whole attention to the business he had in hand, and was not bound to look out for extraordinary dangers occasioned by negligence of the persons in charge of the road.' The court in that case recognized the rule requiring persons about to cross a track to look out for approaching cars, but it was said: 'This rule has no application to the case where, by the arrangement of the corporation, it is made necessary for passengers, in passing to and from the cars to the depot, to cross the track.'

"In *Terry v. Jewett*, 78 N. Y. 338, 5 Am. Neg. Cas. 225, deceased left the station, walked diagonally towards the cars, across an intervening track, and, as the passenger train approached, the freight train struck him. According to the testimony of one of the witnesses, the train came to a standstill, and then started a little, and thus it would appear that deceased had some reason for supposing that the train had started on its way, although it seems that she was mistaken in respect to its going on. The court said: 'She evidently, however, was impressed with the necessity of haste in reaching the train, and she evidently passed on without looking to see if any other train was approaching. Had she done so, she would have seen the freight train, and avoided the danger. There would have been no impropriety in her moving towards the passenger train had she exercised good care and caution, as she had reason to believe that the train was near at hand, and there was an implied invitation to cross the track. This was an assurance that she could do so with entire safety, but did not justify negligence on her part.' The court further said: 'It was, we think, a question of fact for the jury to decide whether the deceased, under all the circumstances, was guilty of contributory negligence.' A similar ruling was made in *Brassell v. N. Y. Cent., etc., R. R. Co.*, 84 N. Y. 241, 5 Am. Neg. Cas. 231, and the doctrine of *Klein v. Jewett*, 26 N. J. Eq. 474, 5 Am. Neg. Cas. 1, was followed by the Supreme Court of Colorado in *Denver v. Rio Grande R. R. Co. v. Hodgson*, 18 Colo. 117, 2 Am.

Neg. Cas. 226. These cases clearly sustain the contention of plaintiff that it was negligent for the railroad company to run a train between the station house and a train opposite the station, engaged in discharging and taking on passengers, and that it is not negligence *per se* to attempt to board a train so standing without looking for an approaching train; that it is for the jury to decide whether, in view of the invitation to board or alight from the train, the passenger was not entitled to assume that the way was clear; and that the rule requiring one approaching a railroad crossing to look and listen does not apply in all its strictness to a passenger acting on such an invitation. Nor do we think that one having necessary and customary business with those on the train, as in case of the plaintiff in the present case, for the purpose of receiving mail and express, stands in any different relation to the company than one intending to take passage on the train. Both are there by invitation, and neither as a mere licensee. *Thomp. Carr.* 106.

"Defendant's counsel cite the case of *Connolly v. N. Y. & N. E. R. R. Co.*, 158 Mass. 8, 12 Am. Neg. Cas. 79, which lays down a rule somewhat at variance with the cases to which reference has been made. This case, as well as *Debbins v. Old Colony R. R. Co.*, 154 Mass. 402, 12 Am. Neg. Cas. 89, was determined by a majority of the court, and the views of the minority are not given, but we think the decision by the majority does not in either case furnish an answer to the cogent and convincing reasoning in the New Jersey and New York cases. Defendant's counsel also cite the case of *De Kay v. Chicago, Mil. & St. P. R'y Co.*, 41 Minn. 178, 4 Am. Neg. Cas. 233, but that case is clearly distinguishable, as well from the New York, New Jersey, and Colorado cases as from the present. In the *De Kay* Case, *supra*, the standing train was on a side track, which, the court says, 'was not the accustomed or appointed place of ingress or egress of passengers. The place for that was the platform. It (the train) was run upon the side track solely for the purpose of letting another train pass.'

"The question still remains whether it can, in the present case, be said that the plaintiff was invited to take the position he did before the western-bound train came to a stop. We think this was a question for the jury. We cannot say, as a matter of law, that persons having business with a train at a way station, at which the stop is but momentary, are guilty of negligence in not waiting until the train comes to a standstill. It is a fact open to every-day observation that those awaiting the arrival of a train do not wait until the train stops, but, on the contrary, as the train approaches, those having business with the train take their position near the track,

and wait for the train to come to a standstill. Indeed, this custom is so general that it must be within the knowledge of those operating trains.

"It was contended that there was a fatal variance between the declaration and the proofs, and for that reason the judgment should be affirmed. The declaration asserts that defendant was engaged in transporting mail, and that it was the custom for defendant to deliver the mail to plaintiff at the point stated; while it is said that the proofs show that the mail was delivered by the United States mail agent. We think this is too technical a view. It is true, the mail agent actually threw the pouch from the train, but this he could not have done had not the train conveyed it to the spot, and afforded opportunity for its delivery. The gravamen of the charge was that, in view of the custom to thus furnish opportunity to plaintiff to receive the mail, defendant neglected its duty in making the place at which the mail was to be received reasonably safe. A different question would be presented if a direct injury had resulted from the throwing off of the pouch by the mail agent. No negligence in this regard was charged. The judgment will be reversed, and a new trial ordered."

#### NOTES OF MICHIGAN CASES RELATING TO PEDESTRIANS INJURED WHILE CROSSING STEAM RAILROAD TRACKS.

Among the Michigan cases relating to accidents to persons on railroad tracks, are the following:

##### *Run over by train while crossing track.*

In *DETROIT & MILWAUKEE R. R. Co. v. VAN STEINBURG*, 17 Mich. 99 (1868), an action brought by plaintiff, who was run over by defendant's train while crossing the track at defendant's crossing, judgment for plaintiff for \$12,000 was reversed for erroneous admission of certain evidence.

##### *Walking on railroad track — Failure to exercise care.*

In *PZOLLA v. MICHIGAN CENTRAL R. R. Co.*, 54 Mich. 273 (1884), judgment on verdict directed for defendant was affirmed, the facts as stated in the syllabus to the official report being as follows: "The wife of a man who was employed by a railroad company in taking her husband his dinner had occasion to cross half a dozen busy tracks that lay side by side. In stepping out from behind some cars that stood on one of the tracks she was struck and injured by an engine on the next track that was backing down in front of her and across her path. *Held*, that whether or not the railway company was negligent in running the engine at a prohibited rate of speed or in failing to ring the bell, the plaintiff was not exercising ordinary care and could not recover for the injury to which she had contributed by her own negligence."

##### *Person crossing track at crossing struck by backing train — Contributory negligence.*

In *MYNNING, ADM'R, v. DETROIT, LANSING & NORTHERN R. R. Co.*, 59 Mich. 257 (1886), an action for damages for death of plaintiff's intestate, who, while

about to cross defendant's track at a crossing, was struck by the car in a train which was backing across the street with a load of lumber, and instantly killed, judgment for plaintiff for \$5,000 was reversed, for refusal to give instructions as to contributory negligence, and error in charge as to damages, etc. It was held that "the rule of law that a railroad track is itself a warning of danger applies equally to a side track as to the main line of the road."

See also subsequent decision in the MYNNING Case, reported in 64 Mich. 93 (1887), where judgment for plaintiff was again reversed, on the ground that, from the evidence of plaintiff, the deceased was guilty of contributory negligence.

In a subsequent decision in the MYNNING Case, reported in 67 Mich. 677 (1888), judgment for plaintiff was reversed, and no new trial ordered.

*Person walking along track killed by train — Failure to look for train — Contributory negligence.*

In BOUWMEESTER, ADM'X, v. GRAND RAPIDS & INDIANA R. R. Co., 63 Mich. 557 (1886), judgment for defendant was reversed, in action for death of person struck by train while walking along track, it being held that the deceased was rightfully on defendant's track, and by its permission. It appeared that deceased was in the employ of defendant as foreman of one of its paint shops, and in going to and coming from his home, about a mile from the shops on the line of defendant's railroad, was accustomed to walk along the track, and this was known to and permitted by defendant. It was held that where an engineer of a train discovers person on the track, it is his duty to bring the train to a full stop, if necessary, to avoid injuring such person.

But in a subsequent decision in the BOUWMEESTER Case reported in 67 Mich. 87 (1887), judgment for defendant was affirmed, it being shown that the engineer of the train which struck plaintiff's intestate was not aware that the deceased would not heed signals, and that when danger was discovered he applied the brakes and made every effort to stop the train. It was also held that deceased was guilty of contributory negligence in failing to look for trains while he was walking along the track.

*Person leaving station and falling into cattle guard — Contributory negligence.*

In STURGIS v. DETROIT, GRAND HAVEN & MILWAUKEE R'Y Co., 72 Mich. 619 (1888), person leaving defendant's station walking along track and falling into cattle guard, judgment for plaintiff for \$1,000 was reversed. The court said: "It is impracticable to keep off trespassers from an open track, and all who go upon it do so on their own risk of such dangers as are incident directly to such use. Under all the decisions made in this State on the subject, a company which has provided all reasonable facilities for ingress and egress from its station houses has done its full duty in that regard. No company can be bound to suppose that passengers who do not know the way will neglect the means open to their sight, and go off in the darkness somewhere else."

*Struck by train at private crossing — Failure to signal.*

In SANBORN v. DETROIT, BAY CITY & ALPENA R. R. Co., 91 Mich. 538 (1892), person piling logs on defendant's unfenced right of way struck by train while crossing track at private crossing, judgment for plaintiff was reversed, it being held that failure to give statutory signals at private crossing was not negligence as matter of law.



*Struck by train while crossing track at station — Contributory negligence.*

IN *DAWE, ADM'R, v. FLINT & PERE MARQUETTE R. R. CO.*, 102 Mich. 307 (1894), where plaintiff's intestate was struck by an incoming passenger train while crossing defendant's track, judgment for defendant was affirmed on the ground of contributory negligence.

*Person in street parade struck and killed by street car.*

IN *MONTGOMERY, ADM'R, v. LANSING CITY ELECTRIC R'Y CO.*, 103 Mich. 46 (1894), where plaintiff's intestate while engaged with others in giving a street parade was struck by a street car, judgment for plaintiff was affirmed.

*Collision and crossing accidents — Michigan cases.*

FOR COLLISION AND CROSSING ACCIDENTS, and cases relating to persons injured while driving or walking on steam and street railroad tracks (other than the cases reported in this volume of AM. NEG. CAS.), see the following:

*Michigan Central R. R. Co. v. Campau*, 35 Mich. 468; *Klanowski v. Grand Trunk R'y Co.*, 57 Mich. 525; *Kwiatkowski v. Grand Trunk R'y Co.*, 70 Mich. 549; *Stern v. Michigan Central R. R. Co.*, 76 Mich. 597; *Little v. Street R'y Co. of Grand Rapids*, 78 Mich. 207; *Breckenfelder v. Lake Shore v. M. S. R'y Co.*, 79 Mich. 563; *Gebhard v. Detroit, G. H. & M. R'y Co.*, 79 Mich. 586; *Underhill v. Chicago & Grand Trunk R'y Co.*, 81 Mich. 43; *Brady v. Toledo, A. A. & M. R. R. Co.*, 81 Mich. 616; *Apsey v. Detroit, L. & N. R. R. Co.*, 83 Mich. 432; *Hagan v. Chicago, D. & C. G. T. J. R. R. Co.*, 86 Mich. 615; *Thayer v. Flint & P. M. R. R. Co.*, 93 Mich. 150; *Graf v. Chicago & N. W. R'y Co.*, 94 Mich. 579; *Louis v. Lake Shore & Mich. So. R'y Co.* (Mich. 1897). 1 Am. Neg. Rep. 87, (companion case to *McDuffie v. Lake Shore & Mich. So. R'y Co.*, 98 Mich. 356).

**DEFECTIVE RAILROAD TRACK — SIDEWALK CROSSING — LIABILITY OF RAILROAD COMPANY FOR INJURY TO PERSON USING SNOWPLOW ON TRACK.** — In *JEFFREY v. DETROIT, LANSING & NORTHERN R. R. CO.*, 108 Mich. 221 (*January Term, 1896*), person cleaning track with snowplow injured by defective rails at crosswalk, judgment on verdict directed for defendant was reversed, *HOOVER, J.*, rendering the following opinion: "The defendant owns and operates a railroad which crosses Larch street, in the city of Lansing, upon a curve, one rail being some inches higher than the other. A sidewalk has crossed said track for many years, and the defendant has been accustomed to keep it in repair. Between the rails, planks, laid upon the ties and flush with the top of the rails, constituted a portion of the walk built and maintained by defendant shortly before the accident complained of. The defendant's servants removed from between the rails the two planks lying nearest to the higher rail. The ground was soon after covered with snow, and the plaintiff while engaged in cleaning the snow from the walk with a team and snowplow, as usual, attempted to cross the track, when the point of the plow struck the rail, by reason of the absence of the two planks, and he

was injured. The court directed a verdict for the defendant, upon the ground that the defendant owed no duty to the public to keep the sidewalk within the rails of its track in such repair as to enable the plaintiff to draw a snowplow with a span of horses over said walk across its track, and therefore was not guilty of negligence in removing the planks from said walk.

"The safety of the public requires that the maintenance of the railroad track be exclusively within the control of the railroad company, and crossings are by our law required to be constructed by them. This, we think, is not merely to relieve the city from the expense, but is to insure the safety of the public, as well those who ride upon the trains as travelers upon the highway. It is the uniform practice of railroads to attend to these crossings, both of the wagon road and sidewalk, to the exclusion of the municipal authorities, so far as the track itself is concerned. This is recognized by the law, and is one of the reasons for holding that the statute which requires a proper restoration of the highway at the time of the building of the railroad by implication imposes the duty of maintaining it in proper condition. This is but declaratory of the common law. See *Maltby v. Chicago & W. M. R'y Co.*, 52 Mich. 108, 110. The right of the plaintiff to recover is not given by the statute authorizing actions against municipalities who fail to keep highways in a condition reasonably fit and safe for travel though it is possible that such statute may have a bearing on the extent of the defendant's duty. We think that railroads must maintain crossings between tracks and rails reasonably fit and safe for the usual and ordinary purposes of the public, and the fact that a right of action might possibly exist against the cities does not affect their liability. In case of a failure, the railroad would be liable, whether the city were or not. *Maltby v. Chicago & W. M. R'y Co.*, 52 Mich. 108, 111. In this case a sidewalk had long been provided. If removed, and the street left in a dangerous condition, as measured by the gauge of the ordinary uses and purposes of the highway, it was negligent, and a cause of action would lie upon behalf of any person injured while making a proper, reasonable, and common use of the way. It is claimed that this was the usual way of cleaning walks, and had been for years, and was a proper use of the highway. While we do not intimate that such practice imposed any additional or greater duty upon defendant, a question not before us, if it appears that the accident was caused by reason of a failure to keep the crossing in a reasonably safe and suitable condition for ordinary uses, the plaintiff should not be denied redress because it was an unusual or hazardous use of the walk, it being, as already said, a

proper and necessary use. The judgment must be reversed, and a new trial ordered."

*Person crossing track at station stumbling over rail — Invitation — Pleading and practice.*

See O'NEIL *v.* DULUTH, SOUTH SHORE & ATLANTIC R'y CO., 101 Mich. 437 (1894), an action brought by plaintiff, who attempted to cross the defendant's tracks and, stumbling over one rail, fell, and was injured upon another. It appeared that plaintiff was on his way to a train to get a letter and crossed the track at defendant's station when the accident occurred. The only question presented was whether the declaration stated a cause of action. HOOKER, J., said:

"It is true, as contended by counsel, that a declaration is not required to set up the evidence by which the cause of action is to be proved, but an action upon the case does require a specific and unequivocal statement of the essential facts constituting the cause of action. We must conclude that the pleader did not state that the defendant had provided this place as one of ingress and egress because it had not done so; that he failed to state that the plaintiff was invited to enter and cross at that point because it would not have been a true statement; that he did not state that it was the usual way for the public to enter and leave such premises because it was not, but, as he says, only of those who had *occasion* to go to and come from the principal part of the business portion of Seney. Furthermore, the declaration shows that the plaintiff was in the habit of crossing at this point, and therefore that he knew that there was no planking between the rails. There is no showing that the premises were out of repair, and we are of the opinion that under the circumstances of this case it should not be left to a jury to determine whether a railroad company should build walks in the rural hamlets along its line at all points where some considerable portion of the public may find it convenient to establish a footpath across its grounds. See Sturgis *v.* Detroit, G. H. & M. R'y Co., 72 Mich. 622. The declaration does not unequivocally state that the defendant ever invited or allured the plaintiff upon such portion of the grounds. The judgment [for defendant] should be affirmed."

## TYLER v. NELSON.

*Supreme Court, Michigan, March Term, 1896.*

[Reported in 109 Mich. 37.]

**COLLISION ON HIGHWAY — ILLWILL OF PERSON — EVIDENCE —**

**INTENT.** — In an action to recover damages for injuries to plaintiff's horse caused by a collision between vehicles on the highway, where it appeared that defendant, when approaching plaintiff in a buggy, left the side of the road on which he was driving and drove across the road and against plaintiff's horse, it was held that testimony as to the ill-feeling defendant bore towards plaintiff before and up to the time of the collision, was competent, as bearing upon defendant's intent or motive in crossing the road in the manner described.

**RULE OF THE ROAD — CONTRIBUTORY NEGLIGENCE.** — The fact that a person driving on the highway turns to the left, instead of to the right, is not conclusive of the question of due care or negligence on his part.

**CONTRIBUTORY NEGLIGENCE — GROSS NEGLIGENCE.** — A person driving on the highway who fails to exercise due care while attempting to pass another coming in the opposite direction is not precluded from recovering damages for injuries to his property where the conduct of the person causing the injury was wanton, wilful or reckless.

**ERROR to Van Buren.** Case by Sheridan Tyler against John Nelson for the alleged negligent killing of plaintiff's horse. From a judgment for plaintiff, defendant brings error. The facts are stated in the opinion. *Judgment affirmed.*

W. N. COOK and T. J. CAVANAUGH, for appellant.

A. H. CHANDLER and HECKERT & CHANDLER, for appellee.

**Moore, J.** — This case was commenced in Justice's Court, tried there, appealed to the Circuit Court, and tried there. A verdict and judgment were rendered for \$40 in favor of the plaintiff. The defendant appeals to this court.

The declaration was in a plea of trespass on the case, "for that, whereas, the said defendant on, to wit, the 7th day of November, A. D. 1894, at the township of Covert, in said county, with force and arms, drove a certain vehicle, to wit, a buggy, which he, the said defendant, was then and there driving in and along the public highway, with great force and violence upon and against a five-year-old mare of him, the said plaintiff, of great value, to wit, of the value of one hundred dollars, which said mare he, the said plaintiff, was then driving in and along the said public highway, and thereby, then and there, the said defendant drove the end of one of the thills of his said buggy into the side

of said plaintiff's mare, whereby she was greatly wounded, and soon after by reason of said wound died." The plea was the general issue, with notice "that the defendant, in the trial of this cause, will give in evidence, and insist in his defense, that, at the time mentioned in plaintiff's declaration, of driving his horse and carriage, as in said declaration alleged, the defendant was driving north on the highway on a slow trot, and turned his horse to the right, when the plaintiff, who was driving his horse on a slow trot towards the south, on meeting the defendant, suddenly turned his horse to the left, and crossed the road in front of defendant's horse, before the defendant had time to hold up; that, if the plaintiff's horse was injured by the thill of defendant's carriage, as alleged in his declaration, the same was done by plaintiff's negligence or fault." It was the claim of the plaintiff, on the trial, that while he was driving on the highway, going south in the east track of the highway, he saw the defendant coming towards him, from the south, in the west track of the highway, "the defendant left the west traveled track of the highway, and drove almost directly across to the east traveled track, on which plaintiff was driving, and in a manner so sudden and unexpected that the plaintiff, in endeavoring to avoid a collision, turned his horse to the left, and drove into the ditch adjoining such east track, but that the defendant, instead of so turning aside as to avoid a collision, drove his horse, in a grossly wanton, wilful, and negligent manner, against the plaintiff's horse, whereby said plaintiff's horse was so wounded that it afterwards died." The defendant denied these claims of the plaintiff, and insisted that he is not responsible for the collision, nor for any injury which resulted therefrom. He claimed that while he was driving on the public highway, and in the exercise of due care, he met the plaintiff, and that the plaintiff, instead of turning to the right, as defendant expected him to do, and as, in the exercise of due care, he ought to have done, turned to the left so suddenly that a collision occurred, and that, if damage resulted to the plaintiff, it was brought about, either wholly or in part, by the negligence of the plaintiff himself.

The first assignment of error is that the declaration is not sufficient, in law, to maintain this action. We think the declaration sufficient for a declaration in Justice's Court. No objection was made, either in Justice's Court or in the Circuit Court, to the sufficiency of the declaration. As we have repeatedly held, it is too

late to raise a question of that nature in this court for the first time.

The second, third, and fourth assignments of error relate to the testimony that was allowed to go to the jury as to the feeling Nelson had towards Tyler before, and continuing up to, the time of the collision and what he said about the collision. We think this testimony competent, as bearing upon the question of intent or motive of the defendant in crossing over from the west track to the east track in the manner in which he did. *Tribune Co. v. McArthur*, 16 Mich. 452; *Druse v. Wheeler*, 22 Mich. 443. All the other assignments of error relate to the refusal of the court to give defendant's requests, and to the general charge as given by the court.

The testimony in the case was very conflicting. If the jury accepted the version given by the plaintiff and his witnesses, it is difficult to see how they could have avoided giving the plaintiff a verdict. On the other hand, if the jury had found the account of the transaction to be as claimed by the defendant and his witnesses, their verdict must have been for the defendant. The learned trial judge gave, in his general charge, the substance of all the defendant's requests to charge that were good law and applicable to the case. So far as it is necessary to quote his charge, it is as follows:

"The burden of proof is on the plaintiff to establish the truth of the matters which he alleges by a fair preponderance of the evidence in the case. He is not bound to prove his case beyond a reasonable doubt, but he should prove the facts which he alleges by evidence which, in the mind of the jury, weighs more than the evidence given on the part of the defendant. And I instruct you, gentlemen, in several requests as presented me by the defendant, as follows: You are further instructed that the injury alone will not support an action on the case. There must be a concurrence of the injury and wrong, and if the act be not unlawful in itself, then, unless done in a manner, at a time, or under such circumstances as would render it wrongful or lacking in due regard for the rights of others, there can be no liability for the injury that may result. You are instructed that a highway is a public way, for the use of the public in general, for passage and traffic, without distinction, and the restrictions upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the

ease; and inconveniences such as are only incident to a reasonable use under impartial regulations are not actionable. You are further instructed that the law of the road and regulation of public carriages is as follows: Whenever any persons shall meet each other on a bridge or road, traveling in carriages, cars, sleds, sleighs, or other vehicles, each person shall seasonably drive his carriage or other vehicle to the right of the middle of the traveled part of such bridge or road, so that the respective carriages or other vehicles aforesaid may pass each other without interference. You are instructed that the traveled part of the road, referred to in the last instruction given you, means that part which is wrought by travel, and is not confined simply to the traveled wheel track. The burden of proof is on the plaintiff, not only to show negligence and misconduct on the part of the defendant, but also to show ordinary care and diligence on his own part; and, if you should find that he did not use ordinary care and diligence on his own part, and thus contributed to the injury, and that defendant was guilty of no more than ordinary negligence, you should return a verdict of no cause for action. The law of the road, as given you in the instruction just read, requires a traveler by any vehicle on the public highway, on meeting another vehicle, to turn to the right, instead of to the left. But the fact that a person turns to the left, instead of turning to the right, is not conclusive of the question of due care or negligence on his part. There may be cases in which due and proper care would require that he should turn to the left, instead of to the right, and in which it would be negligence on his part to turn to the right. If you, in view of all the circumstances, as you find them to have been, find that, in the exercise of due and proper care, the plaintiff should have turned to the right, instead of turning to the left, then his turning to the left would be negligence on his part; but if, under all the circumstances, it was apparently safer for him to turn to the left, and he did only what a man of ordinary prudence would have done under similar circumstances, then he had a right to disregard the law of the road in that particular, and his turning to the left would not in itself be negligence. If, on the other hand, you find that plaintiff, in the exercise of due care, could have avoided the collision by turning to the right, and that a man of ordinary prudence would have done so, and that, instead of so doing, he turned to the left, and thereby came into collision with the vehicle of the defendant,

then such conduct would be negligence on his part; and if you should find that his negligence contributed to the injury received by the plaintiff, he cannot recover, unless you should find that the action of the defendant was wanton, wilful, or so grossly negligent as to indicate a wanton disregard of the rights of the plaintiff. And I further instruct you, as requested, on defendant's part, as follows: You are further instructed that, though you believe, from the evidence, the injury complained of resulted from ordinary negligence on the part of the defendant, still this would not entitle the plaintiff to recover, if you also believe, from the evidence that, by using reasonable and ordinary care and judgment, the plaintiff could have avoided the collision, and saved his horse from injury. I use the term 'ordinary negligence,' gentlemen, and I will further instruct you as to the difference between what is called in law 'ordinary negligence' and 'gross negligence.' The purport of this instruction is that, if you find the defendant only used ordinary negligence, — that is, disregarded those rules of conduct that a man of ordinary prudence would have followed, — but was not guilty of any gross negligence, or wanton and wilful disregard of the plaintiff's rights, then if the plaintiff himself was also negligent, he cannot recover; the rule of law being that, where two parties are careless, and no evil is intended by one against the other, and no gross negligence or wanton disregard by one of the rights of the other, then neither of the parties can recover for the injury. Also, as further requested by defendant, that, in order to entitle the plaintiff to recover damages for injuries sustained by reason of the collision, he must show the injuries to have been attributable to the misconduct of the defendant in this case, and under such circumstances as to exonerate himself (the plaintiff) from all contributory negligence on his part and unless such is apparent from the evidence in this case, it will be your duty to find a verdict of no cause for action. And I modify that, precisely as I did the former, by saying that would be true if defendant was guilty of nothing more than what is called 'ordinary negligence.' On the part of the plaintiff I instruct you as follows: That, if you should find, from the evidence, that the plaintiff was guilty of contributory negligence, yet, if it is further found, from the evidence, that defendant's own conduct was wanton, wilful, or reckless, whereby said plaintiff suffered injury, as he claims in his declaration, then said plaintiff can recover his damages as may be proved.



" The questions in this case, gentlemen, which might be naturally determined in their order, would be these: The first question: Was the defendant himself negligent? Was he guilty of any wrong towards the plaintiff? If he was not, then you should return a verdict, without making any further inquiry. If, on the other hand, you find that he was negligent, that his acts were not such as a man of ordinary prudence would have performed, then the next question would be the degree of negligence of which he was guilty.

" Ordinary negligence is a disregard, as I have already indicated, of those rules of conduct which would govern men of ordinary care and prudence. It is not required of a man that he should use the highest degree of care, — that he should be always as careful as it is possible for him to be. It is incumbent upon him only to be as careful as men of ordinary prudence and judgment would be under the same or similar circumstances. So that the first question would be, Was the defendant lacking in this regard? Were his acts such as a man of ordinary care, prudence, judgment, and caution would not have done? Now, if he was not as careful as men of ordinary prudence would be, then that would be simply what the law calls 'ordinary negligence;' and, if his conduct was no more than this, then the next inquiry would be whether the plaintiff was himself free from negligence which contributed to the injury. That is, would the injury have been brought about if the plaintiff had been himself as careful as men of ordinary prudence would be? The same criterion should determine his conduct as that of the defendant. The plaintiff would not be obliged to use the highest degree of care in order to avoid injury to himself. He would only be required to use that degree of prudence and caution which men of ordinary prudence and caution would use under precisely or very similar circumstances as you may find them to have been from the testimony.

" Now, as I have instructed you, if the defendant was only ordinarily negligent, — that is, if he was careless, — and the plaintiff was careless too, and the injury would not have happened without the plaintiff's carelessness, or if the plaintiff's carelessness contributed in any degree to bringing about the injury to himself, then he cannot recover; the rule of law being, as I have indicated, where two parties are negligent, though the negligence be ordinary negligence, neither can recover from the other. If,

however, you find, as you have already been instructed, that the plaintiff was himself not in the exercise of due care and proper care, but that his conduct was negligent, still, if you find that the conduct of the defendant was wanton and wilful, and if he drove his horse and vehicle purposely into plaintiff, or if, as plaintiff claims, he was trying to crowd him, and was doing that which showed a manifest recklessness and disregard of the rights of the plaintiff, and utter indifference as to whether the plaintiff should be injured or not, then another rule would obtain, and he would be liable for his conduct, even though the plaintiff himself may have been careless. So, as I say, it not only may be important for you to determine whether or not the defendant was negligent, but the degree of negligence of which he was guilty. And if you should find that he was guilty of wanton, wilful, or gross negligence as I have defined it, then it would be no defense that the plaintiff himself was careless.

"In determining these questions, gentlemen, you are to be the sole judges. You are men of experience and intelligence and caution, men of affairs, and in the light of the testimony, looking at it just as you find it to be from the testimony in the case, it will be for you to say whether the parties were negligent, or whether they were in the exercise of due care, and, if the defendant was negligent, the degree of negligence, and the motive by which he was actuated, and what there is disclosed by his conduct at that time."

The judgment is affirmed, with costs. All concur.

BOY KILLED WHILE DRIVING ACROSS TRACK — CONTRIBUTORY NEGLIGENCE FOR JURY — FAILURE TO SIGNAL — EVIDENCE. — In *CRANE v. MICHIGAN CENTRAL R. R. CO.*, 107 Mich. 511 (*December Term, 1895*), boy killed while attempting to drive across track, judgment for plaintiff was affirmed, the syllabus to the official report sufficiently stating the facts as follows: "Plaintiff's intestate, a boy twelve years of age, was killed at a railroad crossing, while attempting to drive across the track. The testimony tended to show that by reason of obstructions between the highway and the railroad, which ran parallel for a considerable distance, an approaching train could not be seen from the highway, for a distance of several hundred feet from the crossing, until the horse was within two feet of the track; that the statutory signals were not given upon the approach of the train; that, although the deceased was notified when at some distance from the crossing that a train

was coming, and remarked that he would have to hurry if he made the crossing, he was afterwards seen driving slowly along, in the apparent exercise of due care, and that a train passed shortly after such conversation, before the deceased reached the crossing. There was no testimony as to decedent's conduct immediately before entering upon the track. *Held*, that the question of his contributory negligence was for the jury." In such case it was also *held* that "testimony of persons who were near a railroad crossing at the time of an accident, and whose attention had been directed to an approaching train, that they did not hear the train whistle for the crossing, is sufficient to justify a finding that the whistle was not sounded, although other witnesses testify positively that the signal was given." *Held*, also, that "it is not error in such case to permit a witness to be asked whether he could have heard the signal if it had been given, the question being merely equivalent to an inquiry as to whether he was within hearing distance." (On the latter point HOOKER and GRANT, JJ., dissented.)

## GREEN v. CHICAGO AND WEST MICHIGAN RAILWAY COMPANY.

*Supreme Court, Michigan, October Term, 1896.*

[Reported in 110 Mich. 648.]

### CHILD KILLED AT PRIVATE WAY ON RAILROAD TRACK — DEGREE OF CARE REQUIRED OF RAILROAD — QUESTION FOR JURY.

Where plaintiff's son, an infant about two years of age, wandered from his grandmother's premises onto the highway, and from there upon a private way to defendant's railroad track, where he was killed by a train of freight cars which was being backed slowly, the question as to the degree of care required of the railroad company in the management of its trains over the private way which was in daily and common use, with the acquiescence of the railroad company, was properly for the jury to determine (1).

### NEGLIGENCE OF PARENT — QUESTION FOR JURY. — Whether the mother of a child two years old who permits it to wander out of her sight but a few moments before an accident to it, is negligent, is a proper question for the jury (2).

ERROR to Muskegon. Case by James Green, administrator of the estate of James Green, Jr., deceased, against the Chicago and West Michigan Railway Company, for negligently causing the

1. *Children on track.* — See note, at end of this case, of Michigan cases relating to children injured on railroad tracks. 2. *Imputed Negligence.* — See NOTE ON IMPUTED NEGLIGENCE, in 11 AM. NEG. CAS. 151-156.

death of plaintiff's intestate. From a judgment for plaintiff, defendant brings error. The case is stated in the opinion. *Judgment affirmed.*

SMITH, NIMS, HOYT & ERWIN, for appellant.

BROWN & LOVELACE and JEROME E. TURNER, for appellee.

**Hooker, J.** — The plaintiff's son, an infant about two years of age, wandered from the premises of its grandmother into the highway, and from there upon and along a private way to the defendant's railroad track, where it was killed by a train of flat or freight cars which was being backed slowly, in the process of switching. No eyewitness of the accident was produced, but there was evidence tending to show that there was no lookout upon the cars as the train was backed up, the brakeman being otherwise engaged at the time. The court refused to direct a verdict for the defendant, and left the questions of plaintiff's negligence and contributory negligence to the jury, and a verdict was found for the plaintiff.

While it is true that the child was not killed upon a public highway, there was evidence that tended to show that the accident occurred upon, or in immediate proximity to, a private way, crossing the defendant's track, which was in daily and common use by the owners and such footmen from the adjoining village as chose to use the same, and that this was known to the defendant and its employees. In such usage, which had long continued, the defendant apparently acquiesced. To what extent this way was traveled, and consequently the degree of care required in the management of trains, were proper questions for the jury. *Schindler v. Milw. L. S., etc., R'y Co.*, 87 Mich. 400; *Townley v. Chicago, M. & St. P. R'y Co.*, 53 Wis. 626; *Reifsnnyder v. Chicago, Milw., & St. P. R'y Co.*, 90 Iowa, 76, 11 Am. Neg. Cas. 537 n.; *Clampit v. Chicago, St. P., etc., R'y Co.*, 84 Iowa, 71, 11 Am. Neg. Cas. 530; *Cooper v. Lake Shore, etc., R'y Co.*, 66 Mich. 261.

The mother of the child was visiting at the grandmother's, and the child was with other children in the yard. The testimony indicates that they were out of sight but a few moments before the accident occurred; and we cannot say that the mother was negligent, that being a proper question to be left to the jury. The judgment is affirmed. The other justices concurred.

NOTE OF MICHIGAN CASES RELATING TO ACCIDENTS TO CHILDREN  
ON TRACK AND INJURIES SUSTAINED IN COLLISION WITH CARS.

Among the cases relating to accidents to children on railroad tracks (other than those reported in this volume of AM. NEG. CAS.), are the following:

*Boy killed in collision — Riding in dangerous place — Contributory negligence.*

In *ECLIFF v. WABASH, ST. LOUIS & PACIFIC R'Y CO.*, 64 Mich. 196 (1887), boy twelve years old riding on freight train in front of engine killed in collision with another engine judgment for defendant was affirmed, it being held that the plaintiff's intestate was guilty of contributory negligence, there being no conflict of evidence on this point, and no gross negligence shown on part of railroad company.

*Girl killed at crossing — Backing train at street crossing — Gross negligence of railroad company.*

In *COOPER, ADM'R, v. LAKE SHORE & MICHIGAN SOUTHERN R'Y CO.*, 66 Mich. 261 (1887), where girl eleven years old was fatally injured at railroad crossing, judgment for plaintiff for \$1,550 was affirmed. It was held to be "gross negligence in a railroad company to back its trains across the main street in a village without a rear brakeman at the rear end as a lookout, and in readiness, in case of danger, to apply the brakes, and thus prevent collision or accident."

*Child run over on railroad track — Trespasser — Liability of railroad company.*

In *KEYSER v. CHICAGO & GRAND TRUNK R'Y CO.*, 66 Mich. 390 (1887), child about two years and a half old run over while on track by defendant's train, judgment for plaintiff for \$7,000 was affirmed. See also previous decision in the *KEYSER* case, reported in 56 Mich. 559, where judgment for defendant was reversed, it being held that a child was not such a trespasser on a railroad track as to preclude recovery for being run over by negligence of engineer of train, and that the question of the parents' negligence in permitting the child to go on the track was for the jury.

*Child struck by train at street crossing — Gross negligence — Railroad company liable.*

In *BATTISHILL v. HUMPHREYS* (Receivers of Wabash, St. Louis & Pacific R'y Co.), 64 Mich. 494 (January, 1887), an action for injuries sustained by plaintiff, a girl about three years of age, who wandered on defendant's track at a street crossing and was struck by a train, judgment for plaintiff for \$4,000 was reversed, for refusal of trial court to instruct jury that absence of flagman at crossing was not evidence of negligence on part of defendants; refusal to charge that backing train, tender foremost, hauling train behind engine, was not evidence of negligence; and refusal to permit diagram of place of accident to be used by defendant's counsel. *MORSE, J.*, in delivering the opinion of the court, discussed the doctrine of imputed negligence of parents to children, citing numerous authorities on the subject.

A subsequent decision was rendered in the case of *BATTISHILL v. HUMPHREYS*, 64 Mich. 514 (June, 1888), in which judgment for plaintiff was affirmed, it being held that defendant was guilty of gross negligence in not keeping a proper lookout and in running over plaintiff, and such being the case, the question of contributory negligence did not arise.

See also *BATTISHILL v. HUMPHREYS*, in this volume, page 105, *ante*.

*Boy riding in sleigh struck by train at crossing — Railroad company liable.*

In *SCHINDLER v. MILWAUKEE, LAKE SHORE & WESTERN R'y Co.*, 87 Mich. 400 (1891), where plaintiff, about five and a half years old, while riding in rear of sleigh driven by another person, was injured in collision between sleigh and freight train at crossing, judgment for plaintiff for \$8,500 was affirmed.

See former decision in the *SCHINDLER* case, reported in 77 Mich. 136 (1889), in which judgment for plaintiff for \$10,000 was reversed, it being held that no case was made for the jury, there being no evidence of defendant's negligence.

## LILLSTROM v. NORTHERN PACIFIC RAILROAD COMPANY.

*Supreme Court, Minnesota, June Term, 1893.*

[Reported in 53 Minn. 464.]

### DUTY OF RAILROAD COMPANY TO MAINTAIN CROSSING AT PLACE USED BY PUBLIC TO CROSS TRACK — EVIDENCE — PRACTICE. —

1. The rule laid down in *Kelly v. Southern Minn. R'y Co.*, 28 Minn. 98, that where a road is openly and notoriously used as a highway by the public, and is recognized by a railway company as such, by permitting the public to cross the track, and by assuming to maintain a crossing at that point, it is immaterial that the road has not been legally laid out or established, *followed* and *applied* to the facts in this case.
2. In civil actions it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove, and it is the duty of the jury to decide according to the reasonable probability of the truth.  
(Syllabus by the Court.)

APPEAL by defendant, Northern Pacific Railroad Company, from an order of the District Court of Clay County. *Order affirmed.*

"Peder Lillstrom died February 20, 1890. He was injured in the manner stated in the opinion. Plaintiff, Ingri Lillstrom, his widow, was appointed administratrix of his estate, and brought this action under 1878 G. S., ch. 77, § 2, as amended by Laws 1889, ch. 109, to recover \$10,000 damages for the exclusive benefit of herself and his next of kin.

"At the close of all the testimony, the defendant moved the court to direct the jury to return a verdict in favor of the defendant, for the reason that it appeared conclusively by the undisputed evidence that the crossing in question was put in by private individuals, at their own instance, and for their own use, and not on any line of any public highway, and that assent to the use thereof by the public had never been given by the defendant. That the injury complained of was not a natural or probable

result of taking up the crossing plank, and was not a result to be anticipated to follow from such act. The taking up of the plank was not the proximate cause of the injury. The testimony does not show a cause of action against the defendant in favor of the plaintiff. The motion was denied, and defendant excepted. The court, among other things, instructed the jury as follows: ' From the testimony in this case, it appears that was not a public highway; there is no evidence that this was a public laid out highway, the testimony is to the contrary. So the defendant had the right as against the public to take up the crossing; there was no duty on it to maintain this crossing. But if you find that the road was frequently traveled and used by the public, and defendant took the crossing up without putting up any barriers or notice, and the deceased had no notice of it, then, if the road was left in a dangerous condition, it would be negligence on its part. If defendant had put up a notice to call the attention of the public to it, then the public could not have complained. Whatever were its duties to the farmers who had built the crossing, it was under none to the public. But if defendant took up this crossing without putting up barriers or something to notify the public, then, if the public had been using it much, the plaintiff can recover, provided the deceased was free from negligence. The deceased was bound to use such reasonable and ordinary care as a prudent man would use at such a crossing. The crossing having been maintained by the defendant, the deceased had a right to suppose that it was in a reasonably safe condition, that is, such condition as it was in before; but he was bound not only by what he had seen, but by what he did see there, and he was bound to keep such lookout for danger as an ordinary person would do under the same circumstances. To the giving of these instructions, defendant duly excepted. Plaintiff had a verdict January 12, 1892, for \$4,500. Defendant moved for a new trial, and being denied, it appeals.' The facts appear in the opinion.

J. H. MITCHELL, JR., and TILDEN R. SELMES, for appellant.

W. B. DOUGLAS and DAVIS, KELLOGG & SEVERANCE, for respondent.

**Collins, J.** — The plaintiff's intestate, her husband in his lifetime, came to his death through the negligence of defendant railway company, it is claimed, and in this action, which was brought to recover for the alleged wrongful killing, plaintiff had a verdict.

The facts as established on the trial were that, when living, the deceased resided with his family on a farm in a prairie country about one mile east of defendant's line of railway. On the morning of February 18, 1890, Lillstrom, the intestate, left home with a pair of horses attached to bob sleighs to go several miles northwesterly for a load of wood, to obtain which he had to cross to the west side of said line of railway. Leading in the direction he had to go was a generally traveled wagon road, which crossed the railway about five miles from his residence. This road, at least where it crossed the track, was not a regularly laid out highway, but it, including the crossing, had been used by the public for several years. Immediately after the railway was constructed, some five years before the accident in question, two farmers residing in the vicinity had prepared the crossing by digging the approaches, and by placing planking inside and outside the rails. The defendant's section men took charge of the crossing at once, repaired the planking, replaced the same as needed, and otherwise kept the same in proper condition for travel, as fully as if it had been a legally laid out or established highway. The evidence was abundant upon this point, and also that the traveling public had very generally crossed the railway at this point while it had been maintained, preferring it to other crossings on either side. The planking between the rails before mentioned had been kept in place continuously from the time it was first put in until about one month prior to the day on which Lillstrom received his injuries, and was then removed by defendant's section men to prevent the accumulation of snow at that point, and thus facilitate the operation of the railway. No sign was put up, or barriers erected, to notify the traveler of this removal. On the trial it was shown that, in his lifetime, Lillstrom had used this crossing, and when it was in good repair. It appeared that he crossed at another place when going for the wood, and it was not shown that he had been at this crossing at all after the planks were taken up, until he was injured. The 19th of February was a stormy day. About four P. M. a neighbor discovered Lillstrom lying upon the ground, then covered with snow, at this crossing. His horses, attached to the bob sleighs with one trace only, stood on the west side of the rails. One singletree was broken. Upon the sleighs was a heavy load of wood. He had evidently approached the place along the road from the west (the railway running north and south), for the rear bob stood west of the rails



in the traveled track, while the forward bob stood lengthwise and upon the rails, faced to the south. Lillstrom lay across the rails in front of the forward bob. He was conscious, and said that he had broken his neck. His injuries were such as to cause his death the following day.

1. It is contended by defendant company that because the crossing in question was not upon a public highway, regularly laid out or established, it owed no duty to the public to keep it in repair, and therefore was not guilty of negligence when removing the planking from between the rails. As hereinbefore stated, the evidence was plenary that the crossing was openly and notoriously used as such by the public, and that defendant had recognized it as such by permitting the public to use it. It had assumed to maintain a crossing at that point for years, and all of the time had encouraged its use by keeping it in repair. It owed the duty of reasonable care to those using the crossing, and was bound to exercise precisely the same precautions to keep it in repair as if it was in fact upon a legally laid out or established highway. *Kelly v. So. Minn. R'y Co.*, 28 Minn. 98 (1). To the same effect are the cases of *Ewen v. Chic. & N. W. R'y Co.*, 38 Wis. 634; *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289; *Murphy v. B. & A. R'y Co.*, 133 Mass. 121; and *Taylor v. D. & H. Canal Co.*, 113 Pa. St. 162 (2). The question of defendant's negligence was properly one for the jury to pass upon.

2. It is further contended by defendant company, even if its negligence be established, that there was no testimony tending to connect the accident which befell Lillstrom with such negligence; in other words, that it was not shown that the removal of the planks was the cause of his death. We have stated the circumstances under which he was found, and undoubtedly the jurors came to the conclusion that they were warranted in believing

1. In *KELLY v. SOUTHERN MINNESOTA R'Y CO.*, 28 Minn. 98 (1881), an action for injuries to plaintiff's horse, resulting from alleged negligence of the railroad company in neglecting to maintain in a safe condition a highway crossing, in not replacing a plank which had been removed, it was *held* that it was proper to allow plaintiff to prove that, after the injury, defendant repaired the crossing by replacing the

plank. Judgment for plaintiff was affirmed where it was shown that while driving across defendant's track at a highway crossing, the foot of plaintiff's horse was caught and injured by reason of defect on track.

2. The cases cited will be found reported or abstracted in this volume of AM. NEG. CAS.

that, while Lillstrom was attempting to cross defendant's track at the crossing with a heavy load of wood upon his bob sleighs, the runners of either the forward or the rear bob, or both together, struck the rails, which projected a few inches above the snow, with such violence as to suddenly stop the horses, causing one singletree to break, three out of the four traces to become detached, and to throw the forward bob at right angles with the one in the rear, all concurring to precipitate Lillstrom, who, as driver of the horses, would naturally sit upon the top of the load of wood, with great force to the ground, across the rails, and in front of his sleighs, where he was found so injured that he died the next day. The facts as related upon the trial fully justified the jury in believing that the accident happened in this way, and that the removal of the planking was the primary cause of the injuries. It was not necessary for plaintiff to show by an eyewitness exactly how these injuries were received, and that is really what was demanded by defendant's counsel on the argument here. It is not necessary in any action, civil or criminal, that the material facts should be established by direct evidence. In civil cases it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove, and it is the duty of the jury to decide according to the reasonable probability of the truth. 1 Greenl. Ev. (15th ed.), sec. 13a. There was no direct evidence as to the exact manner in which Mr. Lillstrom was fatally injured, but there were circumstances in evidence from which it may be justly and fairly inferred that, when the runners of his sleigh struck the projecting rails, the shock was such as to throw him upon and across the rails with great force and violence. If such be the fair and just inference to be deduced from the evidence, it was sufficient. *Ind., P. & C. R'y Co. v. Collingwood*, 71 Ind. 476; *Ind., P. & C. R'y Co. v. Thomas*, 84 Ind. 197; *Hays v. Gallagher*, 72 Pa. St. 136. The case of *Orth v. St. Paul, M. & M. R'y Co.*, 47 Minn. 384, cited by counsel for appellant, was altogether different from that at bar.

3. This brings us to a consideration of the claim of appellant's counsel that plaintiff cannot recover because there was no evidence produced upon the trial that Lillstrom was exercising ordinary care and caution when attempting to cross the rails. The presumption is that he was, and that he was not guilty of contributory negligence. Such is the settled law in this State, and

the cases cited by counsel are from States in which the opposite rule prevails. There was nothing in the established facts which tended to indicate that he failed to exercise due care when approaching the crossing, of which he had some knowledge. To be sure, the planks had been removed, and to a careful, or perhaps even to an ordinary observer, this might have been obvious. But Lillstrom knew that the crossing had been kept in good condition, and to some extent was warranted in relying upon this knowledge. It was a stormy day in winter, with snow upon the ground which had drifted in, thus rendering the projecting-rails and the absence of the planking less noticeable than would have been the case under other circumstances. Again, it was a railway crossing where the danger to be apprehended was from approaching trains, and where a traveler who knew of the previously good condition of the way would naturally be paying more attention to the right and left along the track than he would to the road over which he was traveling. But even had Lillstrom known of the defective condition of the crossing before he came to it, or had he then observed it, contributory negligence could not conclusively or necessarily be attributed to him. This would depend upon circumstances. It was not made to appear that the crossing was in so dangerous a condition but that a man of ordinary prudence might have reasonably supposed that, with the snow partially filling the space between the rails, and in the exercise of ordinary care, he could drive over in safety. *Nichols v. City of Minneapolis*, 33 Minn. 430.

4. We have examined each of the assignments of error not covered by the foregoing, and there are none which need special attention.

Order affirmed.

## NEWSTROM, ADM'X, v. ST. PAUL AND DULUTH RAILROAD COMPANY.

*Supreme Court, Minnesota, May Term, 1895.*

[Reported in 61 Minn. 78.]

KILLED AT CROSSING WHILE DRIVING ACROSS TRACK—CONTRIBUTORY NEGLIGENCE FOR JURY—EVIDENCE.—*Held*, that upon the evidence the question of the contributory negligence of plaintiff's intestate was for the jury.

Evidence tending to prove, by the experience and observation of the witness, that on other occasions, when the train was being backed down towards the highway crossing in the same manner as on the occasion of the accident, travelers, approaching the crossing in the same manner as the deceased, could not, or might not, hear the approaching train until they were almost at the crossing, *held*, competent upon the question of the negligence of the deceased. Upon the trial the defendant called the plaintiff, who was the widow of the deceased, as a witness, and asked her if her husband, in his lifetime, had not stated to her that the crossing was a dangerous one. *Held*, properly excluded, under G. S. 1894, sec. 5662 (1). (Syllabus by the Court.)

ACTION in the District Court for Ramsey County. *Order affirmed.*

"Appellant's first assignment of error referred to in the opinion was that the court erred in refusing the request of appellant that a verdict be directed in its favor upon all the evidence. Appellant's second request referred to in the opinion was as follows: 'There is no statute of this State which required the company to ring its bell or sound its whistle while the train was passing over the railroad crossing in question, or to ring its bell or sound its whistle continuously from a point eighty rods distant to the crossing.' " The facts appear in the opinion.

J. D. ARMSTRONG and BUNN & HADLEY, for appellant.

JOHN B. & E. P. SANBORN, for respondent.

**Mitchell, J.** — This was an action to recover damages for the death of plaintiff's husband, who was killed by a train on a highway crossing at Dellwood, on defendant's road from White Bear to Stillwater.

The negligence of defendant is not seriously questioned. The crossing is a peculiarly dangerous one. On the east side of the crossing the railroad runs through a cut, and on the north side of the railroad is a bluff or hill, which prevents travelers on the highway approaching from that direction from seeing a train coming from the east until within a few feet of the crossing. The train in question (a passenger one) was backing down from Mahtomedi at the rate of twenty miles an hour, with the coaches in front of the engine, running on a down grade, without much steam, and hence making comparatively little noise, and no signals of its approach were given (as the evidence tended to show) within 800 feet of the crossing. Such a state of facts

1. See notes of Minnesota cases, at end of this case, relating to collisions between trains and vehicles at crossings.

would establish a clear case of negligence on part of the defendant.

The main contention of the defendant is that the evidence conclusively shows that the deceased was guilty of contributory negligence in not looking and listening for approaching trains before attempting to cross the track. It appears that deceased lived at White Bear, two or three miles distant, had frequently driven over the road, and was familiar with the crossing, and on one occasion had remarked that it was a dangerous one. He was coming from the north in a one-horse wagon, and sat on the front seat driving, while two women occupied the back seat. The horse was a gentle one, which was not afraid of the cars, and there is no evidence that it became unmanageable or got out of the control of the deceased. As both of the women were also killed, there was no testimony from any occupant of the wagon as to how the accident occurred or as to the conduct of the deceased. Heckle, who resided near the highway and about 450 feet north of the crossing, and Breen, who was about sixty feet south of it, were the only eyewitnesses of the accident. Heckle saw deceased when he drove past his house, and says the deceased and the women were engaged in conversation, which they continued after they passed; that the horse was going at a slow or jog trot of about four miles an hour, which continued without stop until the collision occurred; that he saw the deceased from the time he passed his house until the accident happened, and that he did not see him look up or down the track during that time, except that once, when he was about sixty feet from the crossing, he saw him turn his head around towards the east. It does not appear, however, that there was anything special to attract his attention to the action of the deceased until he saw that an accident was imminent, when he says the deceased, when he got on the track, seemed as if he was trying to cramp his horse around to the right. It should be stated that the railway west of the crossing was in plain view from the highway. Breen's attention was not particularly directed to the deceased until he was within twenty-five or thirty feet of the crossing, when, being aware of the approach of the train, and seeing that deceased did not seem to realize the danger, he attempted to attract his attention so as to warn him of it, but failed to do so. When asked whether he saw deceased look up or down the track, he said: "I can't say that I did. Just before he got to the track he

looked; that is, when he realized there was danger I saw him glance around." He also testified that deceased "didn't seem to realize that there was danger until his horse's head was on the track, and then I saw him stop and jerk his right rein," but it was then too late. It is quite evident that the time that elapsed after Breen's attention was attracted to the deceased, and before the accident occurred, was infinitesimally brief, — not more than a very few seconds. It also appears that there was no point on the highway from which deceased could have had a view of the railroad, so as to see an approaching train from the east, until he emerged from behind the bank or bluff, when his horse's head would be within a short distance of the track, — six to twelve feet, according to the testimony of some witnesses. There is also evidence from which the jury might have found that, even by the reasonable exercise of his sense of hearing, the deceased could not (in the absence of signals) have heard the train until both he and it were in close proximity to the crossing, especially as the train was backing down with comparatively little noise, and the wind was blowing from the northeast. The evidence, however, does show that there was a point after he had emerged from behind the bluff, and before his horse entered upon the track where, if deceased had come to a full halt and looked up the track, he could have seen the train; but unless we can hold, as a matter of law, that not to do so was, under the circumstances negligence, we think the question of his contributory negligence was for the jury. There is no presumption that he was negligent. On the contrary, the burden was on defendant to affirmatively prove that he was. If, in the absence of any opportunity to look for an approaching train until he got from behind the bank or bluff and within a few feet of the crossing, the deceased diligently used his sense of hearing in listening for an approaching train, and heard neither signals nor the noise of moving cars it cannot be held that it was *per se* negligence not to come to a standstill when his horse's head was at most only a few feet from the track, and look for an approaching train, when the act of crossing it was only a matter of a very few seconds.

While a traveler cannot omit to exercise proper diligence in "looking and listening," in reliance upon the railway company doing its duty in giving signals, yet we think that, under the circumstances, the deceased, in regulating his own conduct at this particular time, might have some regard to the presumption that

the defendant would perform its duty. This court has endeavored to hold travelers, when about to go upon a railroad crossing, to the absolute duty of exercising their senses to the extent of their reasonable opportunities in looking and listening for approaching trains. But every case must depend, to a certain extent, upon its own peculiar facts; and we have never laid down a hard and fast rule that, under all circumstances, they must secure a view of the track before attempting to cross, as, for example, by getting out of a vehicle and walking ahead of it in order to look up and down the track. We doubt whether the evidence in this case conclusively shows that the deceased did not look up the track after he got from behind the obstruction, but, even if it does, we could not hold, as a matter of law, that this constituted negligence. We admit that there is considerable evidence tending to show that deceased was somewhat heedless of the known dangers of this crossing, but, after all, it was a question for the jury. This disposes of defendant's first and second assignments of error; for the request referred to in the second assignment in effect asked the court to charge the jury that the failure of the deceased to look up the track, after he passed the obstructions and reached a point within a few feet of the crossing, would, as a matter of law, constitute negligence.

2. Defendant's second request to charge was properly refused, because the first part of it was not a correct construction of the statute. Pen. Code, § 343 (G. S. 1894, § 6637). The latter part of the request, standing alone, would have been correct.

3. If the testimony of the witness Milner, referred to in the fifth assignment of error, had been to the effect that the defendant had, on other occasions, been guilty of similar acts of negligence in failing to ring a bell or sound a whistle, it would have been incompetent. But, as we understand the testimony, it merely tended to prove, by the experience and observation of the witness on other occasions, that when a train was being backed down in this manner, such signals, when given, could not, or might not, be heard by a traveler on the highway approaching the crossing. For this purpose we think the evidence was competent, as bearing upon the question of the negligence of the deceased. The trial court may not have stated accurately the ground upon which the evidence was admissible, but that is immaterial as long as it was in fact so.

4. The defendant called the plaintiff herself as a witness, and

asked her if the deceased in his lifetime had not often stated to her that this was a bad or dangerous crossing. The court excluded the evidence, on the ground that it is not competent for any party to an action, or interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased party or person relative to any matter at issue between the parties. G. S. 1894, § 5660. It may, at least, admit of doubt whether this statute applies to a case where the party is called to give testimony against his interest, but we think the evidence was properly excluded, under G. S. 1894, § 5662, which provided that neither husband nor wife can, either during marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage. We have held that this prohibition is not confined to communications on subjects of a confidential nature, but extends to all communications, except, perhaps, those which from their very nature were evidently intended to be communicated to others. *Leppla v. Minnesota Tribune Co.*, 35 Minn. 310. The fact that the husband is dead does not alter the rule.

Order affirmed.

#### NOTES OF MINNESOTA CASES RELATING TO COLLISIONS BETWEEN TRAINS AND VEHICLES AT CROSSINGS.

In addition to the cases reported in this volume, see the following decisions in Minnesota relating to collisions between trains and vehicles at railroad crossings:

*Person driving sleigh killed in collision with train at crossing.*

In *BOLINGER, ADM'R, v. ST. PAUL & DULUTH R. R. CO.*, 36 Minn. 418 (1887), judgment for plaintiff for \$5,000 and order denying defendant new trial was affirmed, in action for death of plaintiff's intestate, caused by collision of defendant's train with the sleigh in which deceased was riding at a public crossing. The management and speed of a train, whether watchman was necessary at street crossing, the contributory negligence of deceased, were questions proper for the jury to determine.

See also *FABER v. ST. PAUL, MINNEAPOLIS & MANITOBA R'Y CO.*, 29 Minn. 465 (1882), collision between wagon and train at crossing; judgment for plaintiff affirmed.

See also *BROWN v. MILWAUKEE & ST. PAUL R'Y CO.*, 22 Minn. 167 (1875), collision between vehicle and train at crossing; judgment for plaintiff reversed.

*Collision between vehicle and train at crossing — Failure to signal — Contributory negligence.*

In *HENDRICKSON v. GREAT NORTHERN R'Y CO.*, 49 Minn. 245 (1892), person driving killed in collision of vehicle with train at crossing, order denying plaintiff new trial was reversed. It was held that "when, by reason of an omission



or a neglect to sound the whistle or ring the bell of a locomotive as it is approaching a dangerous crossing, the vigilance of a traveler upon the wagon road is allayed, and he is led into a position or situation in which his life is jeopardized and finally lost, his lack of vigilance cannot be held to amount to culpable or concurring negligence, as a matter of law. Evidence examined and held not to have justified trial court in directing verdict for railway company."

*Vehicle struck at private crossing — Contributory negligence.*

In *WESTAWAY v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'y Co.*, 56 Minn. 28 (1893), it appeared that "plaintiff's team was struck and injured on a private crossing by one of defendant's engines, and the question of the negligence of the defendant and that of the servant of the plaintiff, in charge of plaintiff's team was by the court submitted to the jury for its determination; but for errors of the court, particularly in refusing certain instructions asked by the defendant upon the question of contributory negligence, a new trial was granted."

*Crossing track in wagon and struck by train.*

In *STRUCK v. CHICAGO, MILWAUKEE & ST. PAUL R'y Co.*, 58 Minn. 298 (1894), where plaintiff's intestate, while crossing defendant's track in a wagon, was struck by defendant's train, verdict for plaintiff for \$2,500 and order denying new trial was affirmed. Question of contributory negligence for jury.

*Person riding in wagon by invitation injured in collision with train at crossing — Looking and listening.*

In *HOWE v. MINNEAPOLIS, ST. PAUL & SAULT SAINTE MARIE R'y Co.*, 62 Minn. 71 (1895), person riding in wagon at invitation of owner and driven by another, injured in collision with one of defendant's trains at a crossing, there was a verdict for plaintiff for \$20,000, which the court, with plaintiff's consent, reduced to \$14,500. On appeal by defendant order denying new trial was affirmed. It was held that "the rule that it is negligence *per se* for one driving a team on a highway not to look and listen for trains when approaching a railway crossing is not, as a general rule, applicable to a mere passenger in a vehicle who has no control over the driver or his management of the team."

In the *Howe* case, *supra*, counsel for both appellant and respondent cited numerous "crossing cases," in which the Minnesota cases and numerous authorities from other States were reviewed in able briefs submitted by them respectively.

*Animals on track — Collision with trains.*

*CHISHOLM v. NORTHERN PACIFIC R. R. Co.*, 53 Minn. 122 (1893), cows killed at farm crossing; judgment for plaintiff for \$130 affirmed.

*ERICSON v. DULUTH & IRON RANGE R. R. Co.*, 57 Minn. 26 (1894), animal killed on track; judgment for plaintiff affirmed.

See also *Johnson v. Chicago, M. & St. P. R'y Co.*, 29 Minn. 425; *Watier v. Chicago, St. Paul, M. & O. R'y Co.*, 31 Minn. 91; *Green v. St. Paul, M. & M. R'y Co.*, 55 Minn. 192; *Moser v. St. Paul & Duluth R. R. Co.*, 42 Minn. 480.

## HEININGER V. GREAT NORTHERN RAILWAY COMPANY.

*Supreme Court, Minnesota, December Term, 1894.*

[Reported in 59 Minn. 458.]

**HORSE FRIGHTENED BY NOISE OF TRAIN AT CROSSING — PERSON RIDING INJURED — CONTRIBUTORY NEGLIGENCE.** — The plaintiff, on horseback, approached within forty paces of a grade crossing (not within a city) of a highway and defendant's railroad, when his horse was frightened by the sounding of a whistle of an approaching engine, then very near the crossing. There was no evidence that the engineer saw the plaintiff before he sounded the whistle, or that he sounded it in any unusual or extraordinary manner; nor was there any evidence that he had not sounded it eighty rods from the crossing, and at intervals thereafter, as required by statute. Had plaintiff looked, there was nothing, after he got within 1,000 feet of the crossing, to prevent his seeing an approaching train at any point on the railway within eighty rods of the crossing. He was familiar with the crossing, and knew that the train was about due. He was unacquainted with the habits or disposition of his horse. *Held*, that plaintiff could not recover — First, because it did not appear that defendant was guilty of negligence; and, second, because he himself was guilty of negligence in not looking for an approaching train in time to stop, if necessary, at a sufficient distance from the crossing to avoid the danger of his horse becoming frightened (1).

(Syllabus by the Court.)

**APPEAL** by defendant, the Great Northern Railway Company, from a judgment of the District Court of Stearns County.

"On April 27, 1893, the plaintiff, Joseph Heininger, living in St. Cloud, was hired by a merchant to go six miles south to a farm house and bring in a horse. He went, got the horse, and was riding him along the highway toward town, about eleven o'clock in the forenoon, when he approached a grade crossing over defendant's railroad track. Just then a passenger train going north on schedule time and usual speed, blew the engine whistle, and the horse taking fright ran ahead against the train and threw plaintiff off. He was seriously injured and brings this

1. *Horse frightened by noise of whistle* \$4,040 for plaintiff and order denying defendant new trial was affirmed. — *Question for jury.* — In *DUGAN v. ST. PAUL & DULUTH R. R. Co.*, 43 Minn. 414 (1890), plaintiff's horses becoming frightened at noise of locomotive whistle and running away and injuring plaintiff, there was verdict for

Whether the blowing of the whistle was, under the circumstances, negligent, was properly for the jury to determine.

action to recover damages. He had a verdict for \$700. Judgment was entered thereon and defendant appeals." *Judgment reversed.*

M. D. GROVER and GEO. H. REYNOLDS, for appellant.

BRUCKART & BROWER, for respondent.

**Mitchell, J.** — The negligence charged against the defendant is that the engineer of one of its trains negligently and wantonly caused the whistle to be sounded violently and with great noise, near a highway crossing, with full knowledge that the plaintiff was in the vicinity, on the highway, on horseback, whereby the horse became frightened and unmanageable, and ran away and injured the plaintiff. The crossing referred to is in the country, a few miles from the city of St. Cloud. The railroad crosses the highway on the same level, at an acute angle, the highway running north and south and the railroad northwesterly and southeasterly. The plaintiff and the train were going in the same direction; that is, the plaintiff north and the train northwesterly. The plaintiff testifies that he rode along without stopping until he was within thirty or forty steps of the crossing, when he, for the first time, discovered the approaching train, which was then within about forty steps of the crossing; that he then stopped his horse, which did not seem to frighten at the sight of the train; but almost immediately, and when the engine was within a short distance of the crossing, the engineer blew the whistle, and that this frightened his horse. The evidence conclusively establishes the following facts: First, that plaintiff was perfectly familiar with the railway and the highway crossing, and with the time when the train in question passed, and knew that it was then about due. Second, that, if he had looked for the train, there was nothing to obstruct his vision for 1,000 feet south of the crossing, except a house which stood about 700 feet from it; hence, although he testifies that he did look and did not see it, it is demonstrated to a mathematical certainty that if he had looked he could not have helped seeing the train at any time after it reached the whistling post, eighty rods from the crossing. The wood piles spoken of were not so high as to obstruct the vision of a man on horseback. There is neither allegation nor proof that the whistle was not sounded at the whistling post, and did not continue to be sounded at intervals, as required by law, until the train crossed the highway. Neither is there any evidence that the engineer, or person acting as such, saw the plaintiff,

or knew of his proximity, before sounding the whistle. The only scintilla of evidence on that point is the testimony of plaintiff, in which he says: "I saw somebody in the cab. He looked up this way when I was coming." But this does not prove that the person in the cab saw him. Moreover, he does not state whether this was before or after the whistle sounded. Nor is there any evidence that the whistle was sounded in any unusual manner, or with any unusual or extraordinary noise.

On this state of facts, the plaintiff cannot recover, for two reasons. First, he himself was guilty of negligence in not looking for the train before he got in such close proximity to the crossing. As it is the duty of persons to look and listen before going upon a railway crossing, in order to avoid collisions with the train, so, as it seems to us, it is equally the duty of those who are driving or riding animals which are liable to be frightened by the noises of railroad trains to look and listen, so that, if a train is discovered, they may stop at a safe distance and thus avoid that risk. This was particularly incumbent on plaintiff, for it appears that he knew that the train was about due, and that he was entirely unacquainted with the habits or disposition of the horse which he was riding. But, if there is any doubt as to this proposition, there is another reason why plaintiff cannot recover, viz., that it does not appear the defendant was guilty of any negligence. So far as appears the engineer did nothing but what the law required him to do. Pen. Code, § 343. From giving statutory signals at the place where the law requires them to be given no liability arises. If it had appeared that the signals were not given back at the whistling post, and from there on at intervals, and thereby the plaintiff, without negligence on his own part, had been lured into dangerous proximity to the crossing, and then a whistle had been sounded for the first time, the defendant might well have been held liable, not for sounding the whistle near the crossing, but for not sounding it back at the post. That would have been a case where the performance of half a duty might be worse than to omit it entirely. One of the objects of the law requiring signals to be given at such a distance from a crossing is to enable persons driving animals liable to be frightened by trains to stop at a safe distance to avoid the danger. Or, again, defendant might have been liable (if plaintiff was free from negligence) had it appeared that the whistle, although sounded at a lawful time and place, was unnecessarily sounded

in some unusual manner peculiarly calculated to frighten animals. And, again, defendant might have been liable, notwithstanding negligence on part of plaintiff, had the engineer sounded the whistle at the time he did, after discovering the plaintiff in a place of danger; for such an act might well be deemed wilful and wanton. But the present case lacks some of the essential elements of every one of these supposed. *Dugan v. St. Paul & Duluth R. Co.*, 43 Minn. 414 (1), so much relied on by defendant, was the case of an unnecessary sounding of a whistle (not required by statute) in the streets of a city, in close proximity to teams which were liable to be frightened by the noise. It is therefore not at all in point.

Judgment reversed.

## WATSON V. MINNEAPOLIS STREET-RAILWAY COMPANY.

*Supreme Court, Minnesota, June Term, 1893.*

[Reported in 53 Minn. 551.]

**COLLISION BETWEEN VEHICLE AND STREET CAR — CROSSING TRACK — EVIDENCE — SPEED OF CAR — CARE REQUIRED OF STREET CARS AT STREET CROSSING — RIGHT OF WAY — RUNNING ELECTRIC CARS AT HIGH RATE OF SPEED OVER CROSSING IS NEGLIGENCE.** — 1. One who had been a conductor of an electric street car for two months *held* competent to testify within what distance such a car, going at a specified rate of speed, can be stopped.

2. Evidence *held* to make a case for the jury on the questions of both defendant's and plaintiff's negligence.
3. When a jury report they cannot agree, it is in the discretion of the court to send them out for further deliberation.
4. In such case it is proper for the court to urge them to use all reasonable efforts to come to an agreement, and to state, as a reason for it, that the case is an expensive one to try.
5. At a street crossing as high a degree of care is required of those in charge of an electric street car as of those driving other vehicles.
6. Where the fact to be found is to be determined upon the consideration of numerous facts and circumstances proved, whether and to what extent the trial court, where it has fully, correctly, and clearly stated to the jury the general rules that are to control them in their deliberations on the facts, shall call their attention to particular facts and circumstances, is in its discretion.

1. See note of the *Dugan* case, appended to the headnote of the case at bar, p. 143, *ante*.

7. A street-railway car has no priority of way at a street crossing, with respect to other vehicles, and when the driver of such another vehicle, approaching the street-railway track to cross it, sees a car approaching at such a distance that he can apparently make the crossing safely, he has a right to attempt it, and it is not negligence *per se* in him to attempt it without looking a second time at the car (1).
8. Upon much-traveled streets in a city it is negligence to run an electric street-railway car over a crossing at a high and dangerous rate of speed; and it is also negligence to run it over a crossing, the person in charge of it not being on the lookout, nor having the car under control, nor using the proper means to stop it, so as to avoid a collision.
9. Damages held not excessive.  
(Syllabus by the Court.)

APPEAL by defendant, Minneapolis Street Railway Company, from an order of the District Court of Hennepin County. *Order denying defendant new trial affirmed.*

"On April 23, 1892, the plaintiff, Lucius E. Watson, was driving east on Eleventh avenue across the defendant's railway tracks on Washington avenue, South. He had four horses and a heavy load of lumber, about 4,000 feet, which he was delivering for a lumber company. An electric interurban street car coming from the south struck his load before he could get it across and clear of the track, and he was thrown off and injured. He brought this action to recover damages, claiming the collision was due to the negligence of the motorman. That he ran the car at the rate of over twelve miles an hour, and allowed his attention to be diverted by something on the east side of the street, so that he failed to look ahead and see plaintiff and his load. The answer was a general denial. The evidence was conflicting as to the rate of speed of the car, and whether or not the motoneer saw plaintiff, or struck his gong, or applied the brake, or turned off the current.

"In the charge to the jury the judge said: 'The question for you to determine is, who is to blame? If both parties are to blame, or if neither party is to blame, or if plaintiff only is to blame, he cannot recover. The law does not require that he shall look and listen in all cases before crossing a street-car track. You must decide from all the circumstances in the case how much vigilance and care a man of ordinary prudence should use, in crossing or in looking and listening before he crosses, and in continuing to look and listen as he crosses these street-car tracks

1. See also *Kennedy v. St. Paul City R'y Co.*, 59 Minn. 45, case next reported.

under the circumstances. A man with a heavy load and four heavy horses should use more care and vigilance than a man driving a shorter team and a lighter vehicle. If you find plaintiff was not to blame, that he used a reasonable and ordinary amount of care and vigilance in looking for cars, such as he should have used under the circumstances, then you must determine whether or not the defendant was to blame, through its driver. It is the duty of the defendant also to use reasonable care, to see that it does not injure persons passing over its tracks; it is the defendant's duty to use reasonable care to give warning of its approaching cars when it sees persons about to cross or approaching the crossings of its street-car track, or where they are likely to cross. It is the defendant's duty to keep its cars under reasonable control at such times; and it is its duty to run at a reasonable rate of speed through the crowded streets where there is a great deal of public travel. You must decide whether the driver of this car did give reasonable warning, when he saw this man about to approach this crossing, or about to cross these tracks; whether he used reasonable care in keeping his car under his control at that time; whether he was running at an improper or dangerous rate of speed. A great many accidents and injuries occur in this world where nobody is to blame, and the fact that the street car struck this man is no reason why he should recover from the company, unless it was the fault of the defendant company, and not his fault.'

"The jury retired and were out all night. The next morning they came into court and reported that they could not agree. The judge sent them out again, saying: 'It is your duty, gentlemen, to use all reasonable efforts to come to an agreement in this case. We have taken three days to try it. The fact that it is a difficult case is no reason why you should not use every honest effort to come to an agreement, because the next jury will have to do the same thing; and if you don't agree, the next one will have to try it. It makes expense to the county and to the parties. It is your duty to use every honest and reasonable consideration in attempting to come to an honest and fair agreement.'

"The jury retired, and soon after returned into court, and rendered a verdict for plaintiff, and assessed his damages at \$6,000. The defendant made, settled and filed a case, containing all the evidence and the charge to the jury, and its requests

to charge, and its various exceptions to the rulings, and moved the court to set aside the verdict and grant a new trial. This application was denied, and it appeals.

"Some of the assignments of error mentioned in the opinion were as follows:

"*Third.* The District Court erred in denying the motion of appellant to direct a verdict for the defendant.

"*Fourth.* The District Court erred in holding that the evidence given on the trial sustained the negligence alleged in the complaint.

"*Fifth.* The District Court erred in holding that the evidence given on the trial did not show contributory negligence on the part of the plaintiff.

"*Eighteenth.* The District Court erred in denying the defendant's motion for a new trial.

"*Nineteenth.* The District Court erred in holding that the verdict of the jury was not contrary to law.

"*Twentieth.* The District Court erred in holding that the verdict of the jury was justified by the evidence.

"*Twenty-first.* The District Court erred in holding that the verdict of the jury was justified by the evidence, and the weight thereof.

"*Twenty-second.* The District Court erred in holding that the evidence did not show contributory negligence on the part of the plaintiff.

"*Twenty-sixth.* The verdict of the jury is not justified by the evidence.

"*Twenty-seventh.* The verdict of the jury is against the evidence, and the weight thereof.'"

KOON, WHELAN & BENNETT, for appellant.

MERRICK & MERRICK and H. H. MERRICK, for respondent.

**Gillfillan, Ch. J.** — The witness Walden showed himself competent to state within what distance an electric-railway car going at the rate of fourteen miles per hour (at which rate some of the evidence indicated the car which injured plaintiff was going) can be stopped. He had been conductor on such a car two months, must have seen such cars stopped many hundreds of times, when going at as high a rate of speed as they ordinarily attain, and was at the time conductor on the car which did the injury. It must be presumed that he was an ordinarily observant man, and,



if so, he must have been able to express a pretty accurate opinion on the point.

The evidence made a fair case for the jury, both as to the negligence of the defendant and the contributory negligence of the plaintiff; so that the third, fourth, and fifth assignments of error are not well taken. And it is the same with the eighteenth to the twenty-second, both inclusive, and the twenty-sixth and twenty-seventh.

Whether, when a jury comes into court, and reports that it cannot agree, it shall thereupon be discharged, or shall be again sent out to deliberate further upon the case, is in the discretion of the trial court; and, before this court could order a new trial because of the jury having been sent out again, clear abuse of discretion, resulting in prejudice to the party complaining, would have to appear. Nothing of the kind appears in this case.

There was no impropriety in the court urging upon the jury to use all reasonable efforts to come to an agreement, and stating, as a reason why they should do so, that the case was an expensive one to try, both to the county and the parties.

The court below, in its general charge, in connection with some requests to charge, given and not excepted to, stated clearly and concisely the rules of law applicable to the respective rights of the parties upon the street, and the duty of each in respect to care in making the crossing, and the matter of negligence or absence of negligence on the part of either or both the parties. The only objection to the general charge, insisted upon in appellant's brief, is to a part where the court, after stating the degree of care required of each of the parties, said: "If two teams collide in the street, you must determine by the same rules whether they were using reasonable care towards each other, and, if not, who is to blame." The only suggestion in the brief, of error in this, is that there is a difference between an electric car running on a fixed track, and a team able to turn to the right or left. That is an important consideration when at the time of the collision the car and other vehicle are passing along the same streets, and the question is which ought to have made way for the other. But the collision in this case was at a crossing, and there is no question which ought to have turned to the right or left to let the other pass. Requiring of those in charge of an electric car at a street crossing the same degree of care as is required of the drivers of other vehicles is not stronger than was

laid down in *Shea v. St. Paul City R'y Co.*, 50 Minn. 395 (1), where it was said: "There is no modification or exception that relieves a street-railway company from exercising at least as much care to avoid collisions with other vehicles as the owners of the latter are required to exercise in order to avoid collisions with the cars." So that the degree of care required of a street-railway company at a crossing, by the clause quoted from the charge, to wit, that required of the driver of any other vehicle, was not overstated.

There were numerous requests to charge, some of them very long. Those on the part of the appellant take up over five pages of the paper book. There is a growing tendency — not to be encouraged, we think — on the part of attorneys trying causes, especially those where the fact to be found (such, for instance, as negligence) is to be determined upon the consideration of numerous facts and circumstances proved, to make long requests, instructing the jury what effect they are to give to one or more of such facts and circumstances in arriving at a conclusion on the principal question. It is frequently, perhaps generally, unsafe to give such requests, as it may induce the jury to consider unduly the facts and circumstances specified, and leave out of account others that may be entitled to materially modify their effect. Several of appellant's requests, which the court refused, were of this character. An illustration of it is afforded by its ninth request, which was, in substance, that if, when plaintiff first came along Eleventh, to cross Washington, he saw the car approaching, and knew it would cross the path along which he was moving, and he drove his team along such path, and did not again look until such interval had elapsed that the car was too near to avoid collision, and if, during such interval, had he looked, he could have avoided the collision, he was guilty of negligence. This leaves out very important circumstances, which, on the question of his negligence, the jury were to consider: First, the distance the car was from him when he saw it; second, at what rate of speed he had a right to suppose it was approaching. Suppose, when he saw it, the car was so far away that if it came at the usual rate of speed he could have easily passed before the car reached the crossing. Certainly, in such case, it would not be negligence *per se*, as the request assumes, to cross without

1. See abstract of the *SHKA* case appended as note to the *Kennedy* case next herein reported.

looking a second time. The fourteenth request has precisely the same fault.

When the court, in its general charge, states fully, correctly, and clearly the general rules that are to control the jury in their deliberations on the facts, whether it will call their attention, and, if so, to what extent it will call their attention, to particular facts and circumstances tending to establish the principal fact, such as negligence, is in the sound discretion of the court. It will not be error to decline to do it at all, though, if it do it in such a way as to mislead the jury, it will be error. Of course, where the fact proved is conclusive upon the fact to be found, as proof of an attempt to cross a steam railway without looking and listening, when there is nothing to prevent the party looking or listening, and by doing so he can avoid the danger, is conclusive of his negligence, the court must so instruct the jury. The appellant's eleventh, twelfth, and thirteenth requests were merely the application, to particular facts and circumstances specified, of the rules which the court had, in its general charge or in requests given, stated to the jury, and it was proper to leave it to them to make the application.

The giving of plaintiff's fourth request is assigned as error. That request comes, at least, very near to being obnoxious to the criticism we have made upon several requests on the part of the defendant, and it is necessary to consider if it could have misled the jury. It may be divided into two parts, — the first relating to the question of plaintiff's negligence; the second, to that of defendant's negligence. The first part is the proposition that if, when plaintiff was about to cross, the car was not on that portion of the street over which he attempted to cross, and was not threateningly near or threateningly approaching the same, or if there was nothing to warn the plaintiff of the approach, or of the rate of speed at which it was approaching, he might lawfully drive across said track. The objection to this part of the request is that it ignores the conceded fact in the case, — that he saw the car as he approached the crossing, from which it is claimed that warning of the car's approach was unimportant. As he was about to cross he saw the car just coming off of Twelfth avenue, nearly a block away from him, and there was no evidence that he saw it again till he was already on the track and it was too late for him to avoid the collision. The request is to be understood, and the jury must have understood it, with reference

to that situation. If he had no other notice of the approach than having seen it a block away, and no warning that it was approaching at such rate of speed that he could not safely attempt to cross, he had a right to do so, unless he was bound, seeing it at that distance, to stop till it passed. But, as held in the *Shea* case, 50 Minn. 395, a car on a street railway has not, as, from the necessity of the case, has a train on an ordinary steam railway, a priority of way at the crossing. Of course it would be negligence to attempt it when one has reason to believe that the car cannot be controlled or checked so as to avoid a collision before he gets across. But, with the uncontradicted evidence in the case as to the distance within which the car could be stopped, one seeing it nearly a block away, as he was about to go upon the crossing, would not have any reason to suppose it dangerous. There was no error in that part of the request. After what we have stated above from the request, it continued: "And if, in the exercise of ordinary care, as a prudent person, in so doing, he was injured through the negligence of the defendant, etc." Then follows the specification of acts or neglects which the court, in effect, charged would be negligence. The first of these, to which attention is called by appellant's brief, is: "If said car was running at a high and dangerous rate of speed." There can be no question that, upon much traveled streets in a city, that would be negligent. The second is: If the person in charge "was not then on the lookout, and did not then have his car under control; did not use the proper means or necessary means to stop said car, and avoid such collision." What is then indicated as the duty of one in charge of such a car is not higher than would be required of an ordinary, prudent person in propelling through the thronged streets of a city so dangerous a vehicle as an electric car. The neglect of that duty would be negligence.

The damages allowed were large, but, in view of the injuries sustained by plaintiff, — severe, lasting, and liable to terminate fatally, — we do not consider them excessive.

Order affirmed.

## KENNEDY v. ST. PAUL CITY RAILWAY COMPANY.

*Supreme Court, Minnesota, October Term, 1894.*

[Reported in 59 Minn. 45.]

**COLLISION BETWEEN WAGON AND STREET CAR—EVIDENCE—DAMAGES.**—1. *Held*, that the evidence was sufficient to justify the verdict upon the issues as to defendant's negligence and plaintiff's contributory negligence (1).

2. But *held*, also, that the damages awarded were excessive.

3. Order denying a new trial denied on condition that plaintiff consent to remit \$1,000.

(Syllabus by the Court.)

**APPEAL** by defendant, the St. Paul City Railway Company, from an order of the District Court of Ramsey County.

"April 28, 1893, the plaintiff, Charles Kennedy, was a laundryman. He undertook to drive his laundry wagon across the street-railway tracks in Wabasha street, between Eighth and Ninth streets, St. Paul. An electric street car struck his laundry wagon and upset it and hurt plaintiff's left foot. He brought this action to recover damages, claiming he was exercising due care and that defendant's motoneer was careless and negligent and caused his injury. Plaintiff obtained a verdict for \$3,100. Defendant moved for a new trial. Being denied, it appeals. The discussion here was mainly on the evidence, whether or not it supported the verdict." *Order denying new trial affirmed on conditions.*

MUNN, BOYESEN & THYGESON, for appellant.

J. C. MANGAN and JOHN D. O'BRIEN, for respondent.

**Mitchell, J.**—This is one of a class of cases frequently appealed to this court, involving issues purely of fact, where we have considerable doubt whether those issues were rightly decided, but the evidence is such that an appellate court would not be warranted in disturbing the verdict of the jury. In determining whether the injury to the plaintiff was caused by his own negligence or by that of defendant's servants, the most important, if not the decisive, question was whether the plaintiff

1. See also *Watson v. Minneapolis Street R'y Co.*, 53 Minn. 551, preceding case reported, in which the question of care required of street cars at crossings, and the relative rights of street cars and other vehicles in the streets is discussed.

attempted to drive across the railway track in front of an approaching car already in motion, or whether, when he drove upon the track, the car was standing still, but was afterwards started, and struck his vehicle before he had time to get across. If the former was the fact, he could not recover, for it would be the grossest kind of negligence to attempt to drive across the track right in front of an approaching car, and within so short a distance of it that the motoneer could not, in the exercise of reasonable diligence, stop the car in time to prevent a collision. On the other hand, if the car was standing still when plaintiff started across the track, we think that, notwithstanding the fact that he knew that the car would shortly start, the questions of the motoneer's negligence and of plaintiff's contributory negligence were for the jury. While we are impressed, as the trial judge seems to have been, with the feeling that the evidence of contributory negligence was quite strong, yet, if plaintiff is to be believed (which was a question for the jury), his act was not an attempt to swing across the track in front of an approaching car, nor an attempt to cross heedlessly, without regard to existing conditions, but an attempt to cross in front of a car that was standing still, and which did not start until his horse was upon the track. In view of the relative rights of street cars and other vehicles in the streets, as defined by this court in *Shea v. St. Paul City R'y Co.*, 50 Minn. 395 (1), and *Watson v. Minneapolis Street R'y Co.*, 53 Minn. 551 (2), and in view of the further

1. In *SHEA v. ST. PAUL CITY R'Y Co.* 50 Minn. 395 (1892), it appeared that the plaintiff, John C. Shea, a ivoryman, was, on January 26, 1891, at ten o'clock in the forenoon, driving his team and hack east along Eighth street in St. Paul. In crossing Jackson street his carriage was struck by the electric street-railway cars of defendant, going south, and he was injured, and his hack overturned and broken. He brought this action, claiming the collision was caused by the negligence of defendant. It answered, denying negligence on the part of its servants, and alleging contributory negligence on his part in not keeping out of the way. Plaintiff had a verdict for \$800. Defendant moved for

a new trial, but was denied. On appeal, order denying new trial was affirmed.

It was held in the Shea case, *supra*, that the degree of care required at the crossing of a highway and an ordinary steam railroad is not the test of care required in crossing the track of a street railroad on a public street. Hence the rule in the former case that one approaching the crossing must look up and down the track before attempting to cross is not necessarily applicable to the latter. The failure to do so is not, as a matter of law, negligence.

2. See *Watson v. Minneapolis Street R'y Co.*, 53 Minn. 551, preceding case reported herein.

well-known fact that, in many of our city thoroughfares, street cars pass so frequently that if a person had no right to cross in front of a standing car he might have to wait indefinitely, no court could say, as a matter of law, that to do so was negligence. Other vehicles being in the lawful use of the street, as well as street cars, reasonable care would require that the motoneer, before starting his car, should look to see that the track immediately in front of him was clear, and, if he saw any one then crossing it, to wait long enough to avoid a collision. Taking, as a basis of calculation, the testimony of witnesses as to the relative rates of speed of the car and of plaintiff's vehicle, and the distance traveled by each from its starting point, counsel for defendant attempts a mathematical demonstration that the car must have been in motion before plaintiff drove upon the track. This kind of an argument is frequently resorted to in this class of cases, and, like any other mathematical demonstration, would be conclusive, if it was certain that the premises assumed were correct. But experience teaches that witnesses are usually exceedingly inaccurate in their estimates of short distances and short periods of time, as well as of rates of speed, and hence arguments founded on any such basis are often fallacious, and seldom conclusive.

Counsel also claims that the only allegation of negligence in the complaint was the failure of the motoneer to ring the gong before starting the car, and that upon that issue the plaintiff failed to establish his case by evidence. Without stopping to consider whether this is the correct construction of the language of the complaint, it is enough to say that it is apparent from the record that the case was not tried upon any such narrow construction of the pleading. As the case was tried and submitted to the jury, particularly in the charge of the court, it is clear that the alleged failure to ring the gong was only one, and that not the most important, of the issues litigated by consent of the parties.

We agree with the trial judge that the newly discovered evidence was merely cumulative, and we are of opinion that there was no error in his refusing a new trial on that ground.

2. But, while we are of opinion that we cannot interfere with the finding of the jury on the issues of negligence and contributory negligence, yet we are clearly of opinion that the damages awarded are excessive. We appreciate the extreme caution that

courts, especially appellate courts, should exercise in interfering with the amount of damages awarded by juries in this class of cases; but that there is a limit beyond which, if a jury goes, the court ought to interfere, is well settled. There is such a tendency on the part of juries, at least in certain classes of cases, to award excessive damages, that, if courts did not sometimes exercise their corrective power, great wrongs would be committed under the guise of judicial forms. It appears from the evidence that, when the car (which by this time had been slowed up to a low rate of speed) collided with plaintiff's wagon, his foot was caught between the car and the wagon. The only injury plaintiff sustained was to this foot. The only important evidence as to the nature and extent of these injuries is the testimony of the plaintiff himself, and of his attending physician. Both agree that no bones were broken, but that the foot, particularly the heel, was quite seriously bruised, and swelled up badly, and was quite painful. It was some six weeks before plaintiff could walk on it, during which time he had to use crutches, and was incapacitated in whole or in part from attending to his business, which was that of laundryman. The plaintiff testified that at the time of the trial, which was about six months after the injury, there was a numbness or lack of feeling in some of his toes, and that his foot or ankle still pained him when he set his weight down on it, and that it pained him quite badly at certain changes of the weather. The physician testified that the foot was badly bruised on both sides and back of the heel, and that the muscles were contused. He also testified that it was his opinion, in view of the position in which he found the foot, that the ligaments at the side of the heel had been distended or torn from their attachments, and if so that they would never come back to their place, unless there is new tissue formed, and as a consequence the ankle would be permanently weakened, or its movement impaired so as to be liable to turn to one side, particularly in fast walking or jumping. Here, then, we have a case of badly bruised foot (but no bones broken), which incapacitated plaintiff from walking on it, and compelled him to use crutches for six or eight weeks, and which was quite painful, and the pain from which still troubled him somewhat at times at the date of the trial. The only claim of permanent injury is that the ankle will be weakened on account of supposed injury to the ligaments on the sides, and this is wholly based on the mere opinion of the physician—First,



that the ligaments were injured; and, second, that such injury would render the ankle permanently weak. Aside from the generally uncertain character of expert evidence of this kind, it is not unfair to say that the evidence of this physician on the subject was peculiarly vague and unsatisfactory. On this slender foundation of evidence does the claim for permanent injury rest. The jury awarded plaintiff \$3,100, made up, as we assume, of \$50 for damage to his wagon, \$50 for his physician's bill, and \$3,000 for the injury. Conceding that the evidence establishes the fact that the ankle will be permanently weaker than before, there is no evidence that this does or will diminish plaintiff's earning capacity, or at all interfere with his going about his business, or with his walking in any usual or ordinary way. If \$3,000 is to be allowed for such an injury, at what sums shall the loss of a foot, a hand, a leg, or arm be estimated? At the same ratio such losses would warrant recoveries far beyond any precedent, and which would be liable to bankrupt any business in the country. The proper test is not what counsel for plaintiff suggested on the argument, viz., for what sum would any one be willing to suffer such an injury. Most people would be unwilling to lose a limb for all the gold in the world. But the law does not assume to compensate injured persons on any such basis. There is a sense in which no amount of money will compensate a man for a serious, permanent personal injury. But all the law attempts to do is to compensate him as far as money will do it; and for manifest, practical considerations, there must be some reasonable limits to the amount of this compensation. Our conclusion is that, giving the plaintiff the benefit of everything which the evidence at all tends to prove, and allowing him the largest amount which that evidence would warrant, a verdict in excess of \$2,100 ought not to be sustained. Ordered, that a new trial be granted, unless the plaintiff, within twenty days after filing the remittitur in the District Court, voluntarily consents to remit all of the verdict in excess of \$2,100, in which event a new trial will be denied.

Motion for rehearing denied.

**O'CONNELL v. ST. PAUL CITY RAILWAY COMPANY.**

*Supreme Court, Minnesota, May Term, 1896.*

[Reported in 64 Minn. 466.]

**COLLISION BETWEEN CABLE CAR AND WAGON — CONTRIBUTORY NEGLIGENCE.** — *Held*, in an action brought to recover damages received in a collision between a cable car and plaintiff, who was driving a horse attached to a wagon, that, construing plaintiff's testimony as to the manner of the collision in connection with a certain special finding of the jury, he was guilty of contributory negligence, and that a verdict in his favor must be set aside.

(Syllabus by the Court.)

**APPEAL** by defendant from an order of the District Court for Ramsey County. The facts are stated in the opinion. *Order reversed.*

MUNN, BOYESEN & THYGESON, for appellant.

JOHN E. STRYKER, for respondent.

**Collins, J.** — This action grew out of a collision on Selby avenue, in St. Paul, between plaintiff, who was driving a horse attached to a wagon, in an easterly direction, and a grip car running westerly on defendant's cable line. The negligence attributed to defendant, according to the complaint, was in maintaining, at the point in question, a cable slit of an unusual and dangerous width and construction, in which plaintiff's horse caught his foot, and, while so caught, the employee in charge of the grip car ran into him, causing the injuries complained of. By the answer it was alleged that the injuries were caused solely because the horse suddenly and unexpectedly turned from his course, and jumped directly in front of the grip car as it was being propelled along the rails in the usual and ordinary manner. It was also alleged that the slit was not unusually or dangerously wide, or of unusual or dangerous construction, and, further, that the horse was not caught in the slit. At the trial two special questions were submitted to the jury, — the first, Was the horse caught in the cable slit? The second, Did the horse suddenly and unexpectedly turn from his course, and jump in front of the car? Both of these questions were answered in the negative, and then the jury returned a general verdict for plaintiff, but in a ridiculously small amount, if he was entitled to recover at all.

By reason of the negative answer to the first of these questions, one very important feature has been eliminated from the plaintiff's case. The defendant has thereby been relieved of the consequences of a charge that the cable slit was unusually and dangerously wide, and when examining the evidence for the purpose of passing upon the contention of defendant's counsel that, from plaintiff's own testimony it appeared that defendant's employees were not negligent in any degree, and also that it was conclusively established that plaintiff was guilty of contributory negligence, this court is relieved from a consideration of testimony tending to show that the horse did catch one of his front hoofs in the slit, and was unable to move. Thus stripped, the evidence, construed most favorably for plaintiff, was as follows: He was well acquainted in the locality; knew about the movements of the cable cars, and the method of handling. He knew at what rate of speed the cars usually ran, — about twelve miles an hour, — and supposed the car which struck his horse was running at about that rate. He knew that sometimes the calks upon horses' shoes would catch in the slit, and "made it a point to walk across the cable track. I had been caught two or three times." While driving east, in broad daylight, on the north side of the track, at a sharp trot, — about eight miles an hour, — he saw the car approaching, when it was some distance away; and then he turned his horse to cross diagonally to the south side of the track, slackening the speed of his horse as he turned. When asked to state the distance from the car to himself when he started to cross, his answer was, "Well, I couldn't tell, any more than what I had always considered a safe distance." Upon being pressed for a further estimate of the distance, he replied, "Well, I should put it about seventy-five to one hundred feet." The plaintiff also gave it as his opinion that when the horse first reached the rails the car was from fifty to sixty feet away, and, further, that about two seconds of time would have then been required for crossing and clearing the path of the approaching car. So that, according to his version of the occurrence, plaintiff undertook to effect a crossing which would consume two seconds, if he moved along without delay, while the car — running upon a fixed track, and unable to deviate therefrom — passed over ground which it would cover in four or five seconds, as plaintiff well knew. To put it in another form, the car would be at the crossing point in four or five seconds, and plaintiff

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deliberately took the chances of driving his horse and wagon in front of it, in occupying its pathway for half that time, and in safely escaping a collision. And this was without any real or pressing necessity, for the only reason given by plaintiff for crossing the track at all was that when he saw the car, seventy-five or one hundred feet distant, there was a pair of horses, drawing a wagon, about abreast of the car, coming towards him on a walk, and on the same side of the track, and that he crossed to avoid meeting the car and the team at the same time, — a thing which would not have naturally occurred, for the car, running twelve miles an hour, would have passed the walking team and the wagon long before the latter and plaintiff's horse met. And, even if this were not the case, common prudence would have suggested that plaintiff stop his horse where he was until the car had passed him, rather than depend upon two or three seconds of time, which he might have, as a margin, should he cross the track without being delayed. But the finding of the jury that the horse was not caught in the slit, taken in connection with the fact — which stands admitted — that he was struck by the car on the left fore shoulder, and therefore before he had more than fairly gotten upon the track, shows quite conclusively that, when plaintiff attempted to drive across, the car was much nearer than he anticipated, and was almost upon him. In fact, if the horse did not stop of his own accord, or, for some unexplained reason, was not stopped by its driver, he walked no more than eight or ten feet after he was turned from his course before the collision came. So, if we assume that he walked rapidly, — say at the rate of three miles an hour, — the car could not have been to exceed forty feet distant when plaintiff first started the animal in the direction of the track. It seems evident that plaintiff placed himself, according to his own story, in a place of great danger, and that the proximate cause of the collision was his own negligence. For that reason the verdict cannot stand.

Order reversed, and a new trial granted.

**COLLISION BETWEEN TRAINS — DAMAGE TO PROPERTY.** — In **CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.**, 56 Minn. 406 (*January Term, 1894*), an appeal by defendant, the Chicago, Milwaukee and St. Paul Railway Company, from an order of the District Court, Ramsey county, the facts are as

follows: "On October 29, 1891, at four o'clock in the morning, a collision occurred at the grade crossing in Taopi, Mower county, between the north-bound passenger train of the Chicago, St. Paul and Kansas City Railway Company and the west-bound freight train of the defendant. The damage to plaintiff's train was \$1,619 76, and to defendant's, \$2,093.77. There was a contract between the two corporations as to right of way at this crossing as follows: 'In the passage of the respective trains of the parties hereto over the aforesaid crossing, if passenger trains of each of said parties arrive at said crossing simultaneously, the passenger trains of the party of the first part, the Chicago, Milwaukee and St. Paul Railway Company, shall have preference in passing over said crossing, over the passenger trains of the party of the second part, the Chicago, St. Paul and Kansas City Railway Company. In like manner, freight trains of the party of the first part shall have preference over freight trains of the party of the second part; but in all cases passenger trains shall have preference over freight trains.' Each party contended that the collision was caused by the fault and negligence of the servants of the other, and this action was brought to determine the contention. The jury found for the plaintiff, the Chicago, St. Paul and Kansas City Railway Company." The court reviewed the evidence which was held sufficient to sustain verdict for plaintiff for \$1,780.38, and affirmed order denying motion for new trial.

**COLLISION BETWEEN TRAINS — PASSENGERS INJURED.** — In **PRATT v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.**, **CLARK v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.**, 38 Minn. 455 (1888), two actions for injuries arising out of same accident, namely, collision of passenger train (on which plaintiffs were passengers) with a freight train at a crossing, in which verdicts were rendered for plaintiffs (in the first case for \$3,500 and in the second for \$5,500), order denying defendant new trial was affirmed, the plaintiff in first case submitting to reduction of verdict to \$1,750, and in the second to \$2,500.

**ENGINEER INJURED IN COLLISION.** — See **HALL v. CHICAGO, BURLINGTON & NORTHERN R. R. CO.**, 46 Minn. 439 (1891), where engineer of defendant's passenger train was injured in collision with freight cars; defendant's appeal from order denying new trial on plaintiff consenting that the verdict of \$40,133.33, be reduced to \$25,000; order affirmed. (The verdict in the Hall case is one of the largest rendered in Minnesota in a personal injury case, but while large (even on reduction) it was not considered excessive,

where plaintiff, an able-bodied young man, capable of earning a good income from his profession, was rendered an almost helpless cripple and invalid for life.)

## WHERRY v. DULUTH, MISSABE AND NORTHERN RAILWAY COMPANY.

*Supreme Court, Minnesota, May Term, 1896.*

[Reported in 64 Minn. 415.]

KNOWLEDGE OF DANGER — TRAIN AT STREET CROSSING — PERSON CLIMBING OVER FREIGHT CAR — BACKING TRAIN — CONTRIBUTORY NEGLIGENCE. — 1. The fact that a danger is known will preclude a recovery in case of injury, where such danger is apparent and imminent, and of such a character as to impose upon one who undertakes to pass it a hazard that an ordinarily prudent man would not incur. A person has no right to cast himself upon a known danger, when the act subjects him to immediate and great peril.

2. The plaintiff approached a street crossing, and found it blocked by a freight train. It was apparent that the train was liable to start at any moment. After waiting at least twenty minutes, plaintiff attempted to cross by climbing up between the cars, some 250 feet from the engine, and was injured by the sudden backing up of the train, no signal or warning having been given. *Held*, under all the facts of this case, that plaintiff was guilty of contributory negligence, as a matter of law, which would prevent a recovery (1).
3. That other men have attempted or performed reckless and negligent acts of a certain character cannot be allowed to justify or excuse one who attempts or performs the same reckless and negligent act.
4. *Held*, further, that there was no evidence which would have justified the jury in finding that the employee who backed the train knew at the time that plaintiff was in a dangerous place, or had reason to suppose that he was attempting to cross the train.
5. *Held*, also, that the trial court did not err when refusing to grant plaintiff's motion for a new trial on the ground of newly-discovered evidence.  
(Syllabus by the Court.)

APPEAL by plaintiff from a judgment of the District Court for St. Louis County in favor of defendant. The facts appear in the opinion. *Judgment affirmed.*

GEORGE L. SPANGLER, for appellant.

COTTON, DIBELL & REYNOLDS, for respondent.

**Collins, J.** — This was an action brought to recover for injuries said to have been caused by the negligence of defendant's servants while in charge of one of its freight trains at Virginia, in this

1. *Pedestrians injured at crossing or on railroad track.* — See note, at end of this case, of Minnesota cases relating to accidents at crossings or on railroad tracks.

State. At this point the track ran north and south, while Chestnut street crossed it at right angles. About five o'clock in the afternoon of the day in question, plaintiff, on foot, approached this crossing from the west, on his way to a point easterly, a mile or two beyond the crossing, and found the train obstructing the way, the engine headed to the south. It had been at a standstill at this point for several minutes, and it was shown upon the trial that during the time defendant's trains had been running to this point (about three months) it had been the common practice to blockade this crossing with cars for twenty or thirty minutes at a time, and that, while some pedestrians went around the obstructions, others climbed over or crawled between the cars. After waiting a few minutes, standing at a distance of some thirty feet from the train, and over 250 feet from the engine, plaintiff stepped forward, and attempted to climb up between a flat and a box car. While engaged in so doing, the train was suddenly, and without signal or warning, it was claimed, backed up, catching and crushing one of plaintiff's feet. When counsel rested plaintiff's case upon the trial, it was dismissed by the court upon the ground that he was guilty of contributory negligence, and thereafter a motion for a new trial was denied. The plaintiff was a man thirty-three years of age, fully capable of exercising due care and caution in respect to his personal safety. That the street was blocked by the train did not warrant his attempt to pass over the cars. It might have been inconvenient for him to wait until the train moved, or to go around a part of the way, on a street which paralleled the track, or, for the whole distance, on the right of way. That the snow was two or three feet deep, and somewhat concealed excavations on the right of way, into which he might fall, was no sufficient excuse for his adoption of an extremely hazardous and much more dangerous manner of passing the obstruction, although such obstruction was unlawful. His reason for attempting to climb over the train, instead of going around, does not relieve him of the charge of being reckless.

The fact that a danger is known will preclude a recovery, in case of injury, when it is apparent and imminent, and of such a character as to impose upon one who undertakes to pass it a hazard that an ordinarily prudent man would not incur. One has no right to cast himself upon a known danger, where the act subjects him to immediate and great peril. Now the risk and

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peril in attempting to pass over the cars in question was easily appreciated and understood by any person of mature years. The plaintiff had seen a person in the cab of the engine, whom he supposed to be the engineer, and he had also seen a brakeman on the top of the cars. The train was headed southerly, in the only direction trains ran, for Virginia was the northern terminus of the road, and the engine stood several rods north of the depot. The crossing had been blocked for a much longer time than was permissible under the statute, and plaintiff had waited, momentarily expecting the train to start. It was apparent that it might start at any time, and, if it should, the risk and danger was open and notorious. On these facts it must be declared that there was a want of ordinary care upon plaintiff's part, contributing to the injuries received, as a proximate cause thereof, without which the injuries would not have occurred.

The plaintiff was guilty of contributory negligence as a matter of law. It has repeatedly been so held under like circumstances. *Lewis v. Baltimore & O. R. Co.*, 38 Md. 588; *Andrews v. Central R. & B. Co.*, 86 Ga. 192; *Lake Shore & M. S. R. Co. v. Pinchin*, 112 Ind. 592; *Memphis & C. R. Co. v. Copeland*, 61 Ala. 376; *Howard v. Kansas City, F. S. & G. R. Co.*, 41 Kan. 403; *Corcoran v. St. Louis, I. M. & S. R. Co.*, 105 Mo. 399; *O'Mara v. Delaware & H. Canal Co.*, 18 Hun, 192 (1). See also 2 Ror. R. R. 1130. There was evidence to the effect that on different occasions, when the crossing had been blocked prior to this time, travelers on the street had climbed over the cars in the presence of trainmen. There was no proof that any of the crew having charge of this particular train had ever seen this done, or had any knowledge of such acts, and in this respect, as in others, the case is essentially different from that of *Henderson v. St. Paul & D. R. Co.*, 52 Minn. 479 (2).

That other men have attempted or performed reckless and negligent acts of a certain character cannot be allowed to excuse or justify one who attempts or performs the same reckless and negligent acts. The only bearing such evidence could have upon the facts in this case was that given it in *Henderson v. St. Paul & D. R. Co.*, 52 Minn. 492, where it was received

1. See the cases cited, reported in vols. 11 and 12 AM. NEG. CAS. while attempting to climb over freight cars at crossing) is reported with the Minnesota cases in this volume,

2. The *HENDERSON* case (boy injured page 178, *post*.



for the purpose of showing that defendant's engineer, having actual knowledge of the practice, should have exercised a greater degree of care when starting up, for he might reasonably expect that the practice still prevailed, and that persons were then engaged in climbing over the cars. But, as before stated, there was an entire absence of evidence which tended to show that the men having charge of this train knew, or had reason to suppose, that people crossed the cars while they blocked the street at this point.

It has been urged that it was for the jury to determine from the evidence whether the employee who set the train in motion saw the plaintiff when he boarded the cars, or at a time when he might have reason to suppose that plaintiff intended to cross over, and for that reason the court erred in its order of dismissal. We have carefully examined all of the evidence upon this point, and it seems very clear that there was none which would have warranted a finding that any of the trainmen saw the plaintiff on the cars, or in the act of getting on, or engaged in any act which would indicate that he had any intention to cross the train. The plaintiff, after testifying that while standing in the street, before he started to go upon the cars, he looked towards the engine, and saw the engineer, was asked, "Where was he?" The answer was, "He was looking out of the cab window, — looking back at me." Evidently the plaintiff himself made no claim that the engineer was looking back when he started to go upon the cars, but rather that he had previously looked in that direction. Another witness (Tucker) stated that he saw the engineer "leaning out of his cab window, looking towards the street, towards the north, lengthwise of the train." But Tucker stood at the depot 200 feet or more south of the engine, while plaintiff was about the same distance north; so that, when the engineer looked north, his back must have been towards Tucker, and the latter was not in position to state with any accuracy which way the engineer looked. A conclusion that the engineer saw the plaintiff when going towards or climbing up on the cars, based upon Tucker's testimony, could not be allowed to stand. The witness Richards testified that he saw the engineer looking up that way "before Wherry undertook to get in there," while the witness Cook stated that he saw the engineer looking back towards the north "four or five minutes" before the train started up; and this was all of the evidence tending to show that the

engineer had any knowledge of plaintiff's whereabouts when he started the train.

Among other grounds on which plaintiff moved for a new trial was that of newly-discovered evidence, based upon certain affidavits, the only one of any consequence being that of McDonald, the fireman upon the engine at the time plaintiff was injured. The substance of his affidavit was that the regular engineer was temporarily absent from the cab, when a brakeman signaled for the train to back up, and that he, the affiant, reversed the engine without any warning, although he knew that plaintiff was then trying to cross the train at the street. These statements reflect very seriously upon the character of the man who made them, for if they are true it is evident that he did not hesitate to take the chances of inflicting a wanton injury upon the plaintiff, by reversing the engine without giving notice that the train was about to be moved. But on the hearing of this motion it was established beyond doubt that McDonald, in the presence of several witnesses, had repeatedly related what he claimed were the facts surrounding the accident, but entirely at variance with the statements found in his affidavit. He was completely impeached. It was also shown that, shortly before he made the moving affidavit, he had been dismissed from defendant's employ, and also that he was present at the trial, was well acquainted with the plaintiff, and that they were often seen in conversation during the trial. The plaintiff made no denial as to the acquaintanceship or the conversations, and admitted that at the time of the trial he knew that McDonald was the fireman upon the engine when the injuries were inflicted. He offered no explanation of an apparent lack of diligence, except that McDonald, pending the trial, would not tell what his testimony would be should he be placed upon the witness stand. It is not claimed that plaintiff or his counsel were misled in any manner by McDonald. It was certainly laches on plaintiff's part not to have examined the fireman as a witness, when he had the opportunity, if he was anxious to elicit the truth; and, if he dared not to trust him then under oath, we cannot now relieve him, that he may experiment with the witness at another trial. *Taylor v. Mueller*, 30 Minn. 343.

We do not consider it necessary to discuss other assignments of error.

Judgment affirmed.

## PEDESTRIANS INJURED AT CROSSINGS OR ON RAILROAD TRACKS.

Among the Minnesota cases relating to accidents to pedestrians at crossings or on railroad tracks, are the following:

*Employee on steamboat landing caught between railroad cars.*

In *CARROLL v. MINNESOTA VALLEY R. R. Co.*, 14 Minn. 57 (1869), where plaintiff, an employee of a steamboat company, while engaged on the steamboat landing was caught between two cars of a train of defendant which was on the track at the landing, judgment for plaintiff for \$1,500 was affirmed. (See former decision in the *CARROLL* case, reported in 13 Minn. 30, where new trial was awarded defendant.)

*Person on track run over by train — Contributory negligence.*

In *DONALDSON v. MILWAUKEE & ST. PAUL R'y Co.*, 21 Minn. 293 (1875), where plaintiff, while on defendant's track, was run over by train, judgment for defendant was affirmed and new trial denied, on the ground of plaintiff's contributory negligence. "There is no evidence whatever that the injury suffered by plaintiff was wilfully, wantonly or intentionally inflicted. To maintain this action it must appear that the injury was occasioned by negligence on defendant's part, and it must not appear that there was contributory negligence on plaintiff's part." (Citing authorities on this point.)

*Duty of traveler at railroad crossing — Contributory negligence bar to recovery.*

In *BROWN v. MILWAUKEE & ST. PAUL R'y Co.*, 22 Minn. 167 (1875), it was held that "a railroad crossing over a public highway upon the same grade is a place of danger, and is of itself a warning to one about to go upon it to be careful and vigilant, to the extent of his opportunity, in the use of his eyes and ears, to discover an approaching train in time to avoid it; and when the vision of the traveler is so unobstructed along the track that he can easily discover an approaching train, or the circumstances are such that his sense of hearing, if used, must apprise him of the same fact in time to escape it, it will be presumed, under ordinary circumstances, in case of collision, that he did not look or listen, or, if so, that he heedlessly disregarded the knowledge thus obtained. In either of these cases, as a general rule, no action can be maintained."

The rule laid down in the *BROWN* case, *supra*, has been applied and followed in numerous cases. See *CARNEY v. CHICAGO, ST. PAUL, M. & O. R'y Co.*, 46 Minn. 220; *CLARK v. NORTHERN PAC. R'y Co.*, 47 Minn. 380; *Studley v. St. Paul & D. R'y Co.*, 48 Minn. 249; *Magner v. Truesdale*, 53 Minn. 436; *Judson v. Great Northern R'y Co.*, 63 Minn. 248; *SCHNEIDER v. NORTHERN PAC. R'y Co* (Minn. 1900), 9 Am. Neg. Rep. 74.

The *BROWN* case, *supra*, was an action for damages for injuries sustained by plaintiff in collision with train at crossing while attempting to drive across track, and judgment for plaintiff was reversed.

In the *BROWN* case, *supra*, the rule laid down in *DONALDSON v. MILW. & ST. PAUL R'y Co.*, 21 Minn. 293 (*supra*), on contributory negligence as a bar to recovery was applied and followed.

*Signals at crossing — Statute.*

In the absence of any statutory provision on the subject, no legal obligation is upon a railroad corporation to blow its whistle in approaching a public crossing with one of its trains. *BROWN v. MILW. & ST. PAUL R'y Co.*, 22 Minn.

165. See also *LOCKE v. FIRST DIVISION ST. PAUL & PACIFIC R. R. Co.*, 15 Minn. 350 (killing of cow on track).

*Run over on track — Contributory negligence.*

In *SMITH, ADM'R, v. MINNEAPOLIS & ST. LOUIS R'y Co.*, 26 Minn. 419 (1880), action for damages for death of plaintiff's intestate, alleged to have been occasioned by the negligence and carelessness of defendant's employees in running a locomotive over him, it was held that the case was properly dismissed, the evidence clearly showing contributory negligence on the part of decedent. (The rules in *Donaldson v. Milw. & St. P. R'y Co.*, 21 Minn. 293, approved in *Brown v. Milw. & St. P. R'y Co.*, 22 Minn. 165, were applied to the facts in the Smith case.)

*Train running backwards at street crossing.*

In *SHABER, ADM'X, v. ST. PAUL, MINNEAPOLIS & MANITOBA R'y Co.*, 28 Minn. 103 (1881), where plaintiff's intestate was run over and killed by a locomotive of defendant's which was running backwards at a street crossing, judgment for plaintiff was affirmed. "An instruction that it is not necessarily the duty of a traveler approaching a railroad crossing to stop and listen before stepping upon the track and that whether it is necessary and proper for him to stop depends on the circumstances of the case, is not erroneous."

*Freight cars kicked across street crossing.*

In *HOWARD v. ST. PAUL, MINNEAPOLIS & MANITOBA R'y Co.*, 32 Minn. 214 (1884), judgment for plaintiff for \$8,000 and order denying defendant new trial was affirmed, where it appeared that plaintiff was passing along a public thoroughfare and had crossed two railroad tracks, and while attempting to cross a third track was knocked down and run over by freight cars which were being "kicked" across the thoroughfare.

*Accidents on track or at crossings.*

See also *Mark v. St. Paul, Minn. & M. R'y Co.*, 30 Minn. 493; *Loucks v. Chicago, M. & St. P. R'y Co.*, 31 Minn. 526; *Beanstrom v. Northern Pac. R. R. Co.*, 46 Minn. 193; *Hepfel v. St. Paul, M. & M. R'y Co.*, 49 Minn. 263; *Erickson v. St. Paul & Duluth R. R. Co.*, 41 Minn. 500.

*Employees injured on track.*

*SCHULZ v. CHICAGO, MILWAUKEE & ST. PAUL R'y Co.*, 57 Minn. 271 (1894), sectionman killed on track; order denying plaintiff new trial reversed.

*JORDAN v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'y Co.*, 58 Minn. 8 (1894), switchman injured in railroad yard; verdict for plaintiff; order denying defendant new trial affirmed.

**STRUCK BY STREET CAR WHILE CROSSING TRACK — CONTRIBUTORY NEGLIGENCE FOR JURY.** — In *BOYER v. ST. PAUL CITY RAILWAY CO.*, 54 Minn. 127 (*June, 1893*), person struck by street car while crossing track, order granting plaintiff new trial was affirmed, the court (per *VANDEBURGH, J.*), stating the case as follows: "This action against the defendants, for a personal injury, sustained by plaintiff, was dismissed at the trial

because the court deemed that the plaintiff was clearly shown to be guilty of contributory negligence by the evidence. On a review of the evidence upon a motion for a new trial the trial court became convinced that the question was one for the jury, and accordingly granted a new trial. The plaintiff, who lived in Wisconsin, was a stranger in the vicinity, and unacquainted with the street-car lines between St. Paul and Minneapolis. On the 12th day of June, 1892, in company with a friend, he boarded a street car running between the cities named, early in the evening of that day. On the way a severe storm of wind and rain arose, and continued with increasing severity until the car reached a point on Washington avenue, in the city of Minneapolis, between Second and Third streets, where the car was stopped by the storm. The electric current was turned off, and the lights went out. The motoneer or driver notified the conductor that he could not go ahead, for the reason that he could not see, on account of the storm, and that the hail and rain were driving in his eyes. The car was crowded, and the plaintiff and his companion, who were standing up, exposed to the storm, thereupon left the car, with an umbrella raised, and started across the street. In doing so, they stepped upon a railroad track, and plaintiff was knocked down and injured by a car coming from an opposite direction, which he did not see or hear, on account of the storm and darkness. It also appears, according to his testimony, that he did not know where they were, nor that there was a double track on the line, nor see the track in question, which was covered with water at the time. We do not think his evidence in respect to his knowledge of the risk was necessarily incredible, under all the circumstances. The storm, darkness, the noise of the car he was on, and his position thereon, with a crowd, might have prevented him from noticing the cars on the parallel track, or from knowing of the existence of the double track. Notwithstanding plaintiff's failure to watch out for another street car, the question of his contributory negligence was for the jury. *Shea v. St. Paul City R'y Co.*, 50 Minn. 395 (1). The evidence tended to show that the car which struck and injured the plaintiff was running at a very high rate of speed — fifteen or twenty-five miles an hour. The jury might very properly find such

1. It was held in *Shea v. St. Paul City R. Co.*, 50 Minn. 395, collision between electric car and hack while plaintiff was driving across track at intersection of two streets, that the rule that one approaching a railroad crossing upon a highway must look up and down the track before he attempts to cross, is not applicable, as a hard and fast rule, to one who attempts to cross a street-car track upon a public street. The failure to do so is not, as a matter of law, and without regard to circumstances, negligence.

rate of speed to be dangerous, and the question of defendants' negligence was very clearly for them. The storm and darkness also imposed the additional duty of caution while proceeding on a street where pedestrians might be expected to be crossing at any time in the evening. Order affirmed."

## JUDSON, ADM'R, v. GREAT NORTHERN RAILWAY COMPANY.

*Supreme Court, Minnesota, December Term, 1895.*

[Reported in 63 Minn. 248.]

**FAILURE TO GIVE SIGNALS AT CROSSING DOES NOT EXCUSE CONTRIBUTORY NEGLIGENCE — BOY KILLED WHILE DRIVING ACROSS RAILROAD TRACK — CONTRIBUTORY NEGLIGENCE. —** While a failure on the part of those in charge of a locomotive to give the statutory signals constitutes negligence *per se* on the part of the railway company, such failure does not render the company liable for injuries received at a common country crossing if the traveler injured contributed thereto by omitting to look and listen.

Swiftly moving and irregular trains are to be expected at such crossings, and it is the duty of persons about to go upon them to look and listen for such trains, as well as for those upon time or which move slowly.

*Held*, upon an examination of the uncontradicted evidence in this case, that it conclusively appeared that plaintiff's intestate, who was killed at such a crossing, was guilty of contributory negligence, and also that there was no evidence upon which a verdict could be supported founded on the claim that those in charge of the locomotive wantonly ran down upon such intestate, or failed to exercise due care and diligence after discovering that he was in a place of danger (1).

(Syllabus by the Court.)

**APPEAL** by defendant from an order of the District Court for Polk County. The facts appear in the opinion. *Order reversed.*

1. *Child wandering on railroad track struck by train — Imputed negligence. —* In *FITZGERALD v. ST. PAUL, MINNEAPOLIS & MANITOBA R'Y CO.*, 29 Minn. 336 (1882), action for injuries to plaintiff, an infant eighteen months old, who had wandered from his father's house and upon the railway track, where it was struck by one of defendant's trains, order denying new trial to defendant was reversed for erroneous instruction of trial court as to imputing

negligence of parents. The Supreme Court (per DICKINSON, J.) stated the rule to be: "The negligence of a parent having the care of an infant child *non sui juris*, which contributes, with the negligence of a third person, to produce injury to the child, bars a recovery by the latter. The negligence of the parent is in the law to be imputed to the infant."

See note on imputed negligence, in 11 AM. NEG. CAS. 151-156.

C. WELLINGTON, for appellant.

H. STEENERSON, for respondent.

**Collins, J.** — This was an action brought by plaintiff, as administrator of the estate of a minor son, who was killed in a collision between plaintiff's horses and wagon and one of defendant's trains at a public highway crossing, to recover damages.

The complaint, after setting out the circumstances, alleged that the death of the boy was the result of the negligent, unlawful, and wanton management of the train by those in charge after they saw the boy in a perilous position. At the close of plaintiff's testimony, counsel for defendant moved to dismiss upon the ground that the evidence conclusively showed contributory negligence on the part of the boy, and also failed to show that by means of ordinary care or prudence the trainmen could have averted the accident. To a denial of this motion defendant excepted, and then declined to introduce any evidence. The proofs in the case being all before the jury, counsel moved the court to direct a verdict in defendant's favor, on the ground that the evidence clearly showed that the boy was guilty of contributory negligence such as would debar a recovery, and that there was no proof from which it could be found that the defendant's servants were wanton or wilful at the time of the unfortunate occurrence. This was refused, and after a charge by the court to the jury, which was erroneous in several respects, a general verdict was returned in plaintiff's favor. As the order denying defendant's motion for a new trial must be set aside if we are to abide by well-settled principles governing such cases, the facts and circumstances which appeared without contradiction upon the trial should be detailed with considerable minuteness.

The accident occurred on a clear day, in the month of October. The deceased was of ordinary size and intelligence, aged fourteen years and seven months, residing with plaintiff upon a farm about four miles southwest of the elevator hereinafter mentioned. He was presumably in full possession of all his faculties. The country was level prairie, with nothing but buildings to obstruct the view. The roads, judging from the photographs in evidence, were not worked or traveled much, and were in fact little more than wagon tracks across the prairie. Defendant's track, going northerly at and near a station called Kittson, bears slightly to the east. Parallel to this track, on the east side, and about eighty feet distant, was one of the wagon roads we have referred

to. There was no station house at Kittson, and the only buildings were east of the main track, namely, a railroad section house, a small tool house, and the elevator. The tool house stood 270 feet north of the section house, and the elevator 900 feet north of the tool house. The elevator was thirty-two feet wide, and at the rear, — east side, — was the usual driveway for wagons. The front of the elevator stood fifty feet from the main track. A side track left the main near the tool house, and, passing close by the elevator, connected again something over 500 feet northerly. A road from plaintiff's farm ran northeasterly across the prairie, crossing the main and side tracks 480 feet north of the elevator, and it was at this crossing that the collision occurred. Fifty-four feet east of the main track, and a few feet east of the side track, was the railroad ditch, covered where crossed by the highway, by a small bridge or culvert. Twenty feet from the culvert, or about seventy-four feet east of the main track, the wagon tracks bore to the right and to the left into the north and south road we have spoken of. On the morning in question, William Judson, the intestate, went to the elevator with a load of wheat, driving a spirited pair of horses, which his father had owned about one year. He had driven the team several times, and was capable of managing them under ordinary circumstances. He was acquainted with the roads and the surroundings. An older brother, Robert Judson, was in company with him, driving another team. Robert and Ernest Hanna, neighbors, went at the same time, each driving a pair of horses attached to wagons loaded with wheat. All crossed the tracks at the usual crossing, turned south at the forks of the road, and went to the elevator, where the Hannas first unloaded. Robert Judson then took the team driven by his brother, the deceased, unloaded the wagon, and went to the foot of the driveway for his own team and load. Young Judson drove his own team out of the way, and, after getting off the driveway, turned squarely to the north, and started back towards the crossing. Robert and Ernest Hanna had driven over the crossing, had then noticed the train coming from the south, and after driving a few rods westerly, observed young Judson driving northerly towards the forks of the road. They stopped their horses, and at once became fearful of a collision. They were the only witnesses who plainly saw the coming train, the boy with his team, and the collision; and their testimony as to what occurred was exceedingly fair and



impartial. Each of these men noticed that the team was upon a sharp trot, the speed increasing as the horses came on towards the railway crossing, so that, in their opinion, the horses, when they turned westerly at the forks of the road, were traveling from six to seven miles an hour. The boy did not look towards the railway tracks at all from the time these witnesses saw him, soon after he emerged from behind the elevator, but drove straight on, seemingly engaged in arranging the empty sacks on the bottom of the wagon bed. Both witnesses feared that his attention was so much given to the sacks that he would not observe the train, and every movement of the boy and the horses was anxiously noticed by these two men up to the time the latter turned west, seventy-four feet from the rails of the main track. The boy could not then be seen by the men because of the position of the horses. The train, consisting of a locomotive, ten or twelve box cars, and a caboose, was a "wild" freight, running at an unexpected time, and the rate of speed, as estimated by plaintiff's witnesses, was from fifteen to thirty-five miles an hour. It made the usual amount of noise, but there was testimony which would have warranted the jury in finding that no bell was rung or whistle blown for the crossing, except just before the collision, and that in this respect defendant was guilty of negligence. Taking the lowest estimate of the rate at which the horses were trotting, six miles per hour, and the highest estimate for the speed of the train, thirty-five miles per hour, and we find that the latter was going about six times as fast as the former, so that when the train was 1,200 feet from the crossing, the horses were not far from 130 feet south of the forks of the road, say 200 feet from the crossing. When the team reached the forks, where they turned to go west to the crossing, the train must have been about opposite the north end of the elevator, if going six times as fast as the horses. One of the Hannas testified, however, that the train was about half way from the elevator to the crossing when the boy, still busy in arranging the sacks, drove to the west. Standing at the forks of the road, it was undisputed that a person had an unobstructed view of the railway track to a point 1,300 feet south of the crossing. If the boy had looked before turning, say eighty feet from the place of collision, he certainly would have seen the train, for it was then in plain sight, about opposite the north end of the elevator. The eyewitnesses before mentioned stated that the team came rapidly after making

the turn, without being held in, so far as they could see, until the horses reached the culvert, fifty-four feet from the main track, or, perhaps, until the side track, which was a little nearer, was reached, when they appeared to become frightened, swerved to the right, sprung forward, and cleared the front end of the locomotive. The wagon was broken to pieces, and the boy instantly killed, the head of the train being brought to a standstill about 2,000 feet north of the crossing.

There was no effort to show that the engineer or any other employee upon the train saw the horses or the boy at any time, either when they were in a safe place, going northerly on the road, parallel to and about eighty feet from the rails, or after the turn was made, which almost immediately brought the boy into a perilous place, driving, as he was, a spirited pair of horses. And, if we assume that the engineer saw the team and the boy, or should have seen them, — for they were upon his side of the locomotive, — as they were upon the parallel road, it is obvious that he would not expect the boy to disregard the usual instincts of self-preservation, and to immediately place himself in a dangerous position by turning to the left, and approach the crossing. Nor would he be required to make preparations to guard against any such act upon the part of the boy. He would naturally expect that the driver of the team would keep northerly on the road, which continued that way, plain to be seen, or would turn to the east, or perhaps drive out upon the open prairie. So that, had the engineer been on the lookout, as he should have been, for human beings or animals which might suddenly come upon the track, there was not a thing to suggest that plaintiff's intestate contemplated driving upon the crossing until his horses were turned in that direction. Even then the natural supposition would be that the team would be brought to a halt, that the train might pass; not that the driver was unmindful of the danger, and would drive headlong into it. It is plain that, if actual knowledge of the perilous position of the boy is to be attributed to defendant's servants, it can only be from the time that they saw, or, in the exercise of due care, should have seen, that the horses were not being checked, or at least from the time they were turned off from the north and south road towards the crossing. If, as stated by one witness, the train was running thirty-five miles an hour, it was about 400 feet away from the crossing when the horses turned to the west, seventy-four feet from the

same point. If, as stated by witnesses who were in a better position to judge of the speed of the train, it was half way from the elevator to the crossing when the team turned, it was less than 250 feet from the crossing before it could have been surmised that the driver did not intend to stop. No effort was made to show how the train was supplied with appliances for stopping it or reducing its speed, or within what distance it could have been brought to a standstill. There was not a particle of evidence from which it could have been gathered that with the greatest exertion possible the train could have been halted in less than 2,000 feet, the distance it ran before stopping immediately after the accident. The fact was that as to the means for stopping the train, and the ability of those operating it to stop it, or even to reduce the speed in any appreciable degree, there was a total absence of proof, and all was left to be conjectured by the jury. Conjecture and surmise on these important matters, capable as they are of clear proof, cannot be tolerated. If, therefore, the verdict was based, as it might have been under the charge, upon the claim that defendant's employees were wilfully negligent when operating the train, wilful negligence must have been found by the jury solely from the evidence as to the rate of speed, or the failure to give the customary statutory signals when approaching the crossing, or, possibly, both together. There was no other evidence on which to predicate such a finding, unless it is to be held that an engineer is bound to assume that all persons traveling in perfectly secure places in the vicinity of railway tracks may suddenly and unnecessarily leave such places of safety, and drive into those of great danger, where collisions are imminent or inevitable; and therefore that the engineer must manage and control his locomotive with such assumption in view, and be prepared to avoid the consequences as far as possible.

From our statement of the undisputed facts it was conclusively established that the boy was guilty of contributory negligence approaching recklessness. He was not driving towards an unknown crossing, or one made extra hazardous by the manner in which the railway intersected the public road. Although near an elevator situated on defendant's side track, it is clear that the travel was light, and that the crossing was nothing more than a country crossing. There was no town or village, not even a depot, at Kittson. The deceased had been over the highway at this point five or six times before, and, had this not been the

fact, the main and side tracks lay there in plain sight. There was nothing to divert or distract his attention from the approaching train. He drove deliberately towards the crossing, at least, until it was beyond his power to avoid or to extricate himself from peril, without taking the slightest precaution, without looking to see whether a train was coming; and "such omission has been again and again, both as to travelers on the highway and employees of the road, affirmed to be negligence. The track, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom." This is the universal rule, and, in substance, has often been stated by this court. Vigilance is required on the part of one about to cross a railway track. He must look as well as listen. If he fails to do both, and is injured, it is well settled, as the general rule, that no recovery can be had unless there is evidence tending to show that the injury was wilfully or wantonly or intentionally inflicted. We need not cite authorities in support of these propositions. While the failure to give the proper signals constitutes negligence *per se* on the part of a railway company, such failure does not render it liable for injuries received at a common country crossing, if the person injured contributed thereto. *Williams v. Chic., M. & St. P. R. Co.*, 64 Wis. 1; *Stepp v. Chic., R. I. & P. R. Co.*, 85 Mo. 229; *Wabash, St. L. & P. R. Co. v. Wallace*, 110 Ill. 114; *Atchison, T. & S. F. R. Co. v. Townsend*, 39 Kan. 115; *Cleveland, C. C. & I. R. Co. v. Elliott*, 28 Ohio St. 340; *Shaw v. Jewett*, 86 N. Y. 616; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Matta v. Chicago & W. M. R. Co.*, 69 Mich. 109 (1).

There is no merit in the claim of counsel for plaintiff that this case is excepted from the general doctrine because the train was an irregular, running very fast. Swiftly moving and irregular

1. *Contributory negligence in crossing railroad track.* — The New Jersey court holds that the failure of a railroad company to give signals will not relieve the traveler from his duty of looking and listening before crossing railroad track. See *Penn. R. R. Co. v. Righter*, 42 N. J. L. 180, reported in this volume, *post*.

See also *Railroad Co. v. Howard*, 124 Ind. 280; *Grostick v. Railroad Co.*, 90

Mich. 594; *Blackburn v. Southern Pac. Co. (Oregon)*, 55 Pac. Rep. 225. It was held in the latter case that where deceased, without stopping his vehicle for the purpose of listening for approaching trains, attempted to drive across a railroad track in a city street, at a crossing with which he was familiar, and from which the view of the approaching train was obstructed, and

trains are to be expected, and it is the duty of persons about to go upon crossings to look and listen for such trains as well as those on time, or which run slowly. Nor was it shown that the boy had any knowledge of the time or the rate of speed of regular trains when passing over this crossing. If he had no knowledge upon these matters, he was not led into fancied security and a dangerous position because the train was an irregular one, or because it was running rapidly. So, if the verdict was founded upon a finding by the jury that the deceased was not guilty of contributory negligence, — and the charge would have justified such a finding, — the evidence was not only insufficient to support it, but was conclusively against it. Of course, contributory negligence on the part of a person injured will not avail as a defense to the wrongdoer in case the injury is wantonly inflicted, for in such a case the negligence of the injured party would not be the proximate cause of the injury. It was incumbent on defendant's servants, when they discovered the boy in a perilous place, to exercise ordinary care and diligence, depending upon the circumstances, to avoid running him down. There was no evidence from which it could even be inferred that they did not exercise ordinary care and diligence, and consequently nothing whatever to indicate wantonness.

Order reversed, and a new trial granted.

**BOY ATTEMPTING TO CLIMB OVER FREIGHT TRAIN AT CROSSING — INADEQUATE DAMAGES.** — In *HENDERSON v. ST. PAUL & DULUTH R. R. CO.*, 52 Minn. 479 (*March, 1893*), where boy was injured in attempting to climb over freight train standing at crossing, order denying plaintiff's motion for new trial on ground of inadequacy of damages awarded (verdict being for \$250) was reversed. The case is stated in the opinion by the court (per VANDERBURGH, J.) as follows: "The defendant's railway runs through the village of White Bear, and, among others, crosses First street, which is a public and popular thoroughfare, over which

was killed by a train while making such an attempt, a verdict should be directed for the railroad company, although the traveler was approaching the crossing at a slow walk, and the train was running at an unlawful rate of speed; that a failure to stop and listen before attempting to cross, under

such circumstances, was negligence *per se*. The opinion in the Blackburn case, *supra*, reviews the leading cases upon this subject, and contains a clear statement of the law.

See also the cases cited in the opinion in the case at bar, reported in vols. 11 and 12 AM. NEG. CAS.

citizens in great numbers have been accustomed to pass each day to and from their residences or places of business. This crossing is near the yard of the defendant in that village, and is much occupied in switching cars and making up trains, so that the street is frequently blocked so long as to subject persons desiring to cross to tedious delays unless they shall take the risk of crawling under or climbing over or between the cars, or should travel several blocks out of their way, to cross the track elsewhere. This custom or practice of passing over or between cars had been so general as to have become well known to the engineer and fireman in charge of the train upon which the plaintiff was injured. On the morning of the accident, the plaintiff, a boy eleven years of age, was sent by his parents on an errand, which obliged him to cross the track of defendant on the street in question. He found it obstructed by a freight train. The men in charge of it had been engaged in switching, and, when it stopped on the crossing, plaintiff observed the engineer on the engine looking back towards him, and thereupon he undertook to cross by climbing over the bumpers between two freight cars, and jumping off upon the other side. The evidence shows that he had frequently seen others pass over in that way safely, and he had done so himself in sight of the same engineer; yet he admits that he had been warned by his parents and others, and knew that it was dangerous to cross in that way. His testimony, however, tends to show that he relied upon the fact that the engineer saw him in the act of crossing, and on that account did not expect the train would be moved while he was between the cars. It also shows that he was in full view of the engineer when he attempted to climb upon the car, and that there were no intervening obstructions to prevent him from seeing the plaintiff, and that, while the latter was in the act of passing between the cars, and was placing one of his feet upon the connecting link between the bumpers, the train was suddenly backed up, and his foot crushed between them.

“ Upon the evidence in the case we are of the opinion that the jury might find that the engineer saw the plaintiff, and knew that he was trying to pass over between the cars, and that he negligently backed the train down without giving the plaintiff sufficient time to get through safely, particularly in view of the fact that he was in the habit of allowing persons to cross in that way; and, if the jury so found the facts in the case, it was negligence on the part of the engineer which would subject the defendant to an action for damages, unless the plaintiff's own negligence should preclude a recovery in the case. But we think, in view of all the circumstances above enumerated, and taking into consideration the plaintiff's age, that

the court was right in submitting the question of plaintiff's contributory negligence also to the jury.

" Assuming, then, that these questions were for the jury, we are next to consider the further question raised by the appellant in respect to the alleged inadequacy of the verdict. The general power of the court to set aside a verdict for the reason that it is grossly inadequate and disproportionate to the injury suffered in a case of this kind does not appear to be questioned by the defendant's counsel. The ground on which the courts, under statutes similar to our own, usually base such relief is that such verdicts should be treated as not supported or justified by the evidence, and hence new trials have not infrequently been granted on this ground. *Emmons v. Sheldon*, 26 Wis. 650; *Bennett v. Hobro*, 72 Cal. 178; *Benjamin v. Stewart*, 61 Cal. 608; *Platz v. Cohoes*, 8 Abb. N. C. 396.

" The evidence shows that the boy placed his left foot upon the link between the bumpers, when they came together and crushed his toes and the inside of his foot. The great toe had to be amputated, and two others were badly lacerated, and one of them permanently injured. The foot was pressed out of shape, and has never fully resumed its normal condition, and probably never will. He was under surgical treatment for four or five weeks, and experienced considerable pain and suffering. The injury to the foot, together with the loss of the great toe, causes a lameness which is likely to be permanent. The question of the negligence of the respective parties was, as we have seen, one for the jury to decide, and their verdict on that question could not be disturbed; certainly not by this court. But a verdict for plaintiff established the defendant's liability, and the jury was thereupon bound to give adequate and reasonable compensatory damages. Without intimating at all what the damages should be, the court is of the opinion that the amount allowed is inadequate and disproportionate to the nature of the injury, and that the verdict ought not to stand, and the case should therefore be submitted to another jury. The jury may have had so much doubt upon the first question that they were induced to compromise on the second. Order reversed."

## THOMPSON v. DODGE.

*Supreme Court, Minnesota, October Term, 1894.*

[Reported in 58 Minn. 555.]

**DRIVING ON HIGHWAY — RIGHT OF WAY — HORSE FRIGHTENED BY BICYCLE.** — A highway is intended for public use, and a person driving a horse thereon has no rights superior to those of a person riding a bicycle.

A bicycle is a vehicle, and riding one in the usual manner as is now done upon the public highway, for convenience, recreation, pleasure, or business, is not unlawful (1).

A person cannot be made to pay damages for his acts unless they were done in such manner and at such a time as to show that he was acting in disregard of the rights of others.

(Syllabus by the Court.)

APPEAL by plaintiff, N. A. Thompson, from a judgment of the District Court of Dakota County. The facts appear in the opinion. *Judgment affirmed.*

C. P. CARPENTER, for appellant.

HODGSON & SCHALLER, for respondent.

**Buck, J.** — This action was commenced in Justice's Court to recover damages for injury to the plaintiff's carriage, which plaintiff alleges was caused by the carelessness and negligence of the defendant in riding and using a bicycle in the public highway, whereby plaintiff's horse was frightened, and became wholly unmanageable and shied, precipitating the plaintiff, horse, and carriage off from the grade and road into a swamp, and damaging the carriage of plaintiff to the amount of \$15.

The plaintiff recovered judgment for \$15 and costs, but, upon appeal to the District Court of Dakota county the judgment was reversed, upon the ground that, conceding all of the testimony introduced by the plaintiff to be true, the defendant was not negligent. The decision of the District Court was right. It is true that upon a controverted question of negligence, where different deductions or reasonable inferences might be drawn by the jury from the conflicting evidence, the general rule is that the finding of the jury should not be disturbed. But upon the undisputed facts, or assuming the testimony of the plaintiff to

1. For actions arising out of accidents caused by horses becoming frightened at bicycles on highway from 1897 to date see vols. Rep., and the current series of Reports. 2-11 Am. Neg. numbers of that



be true, it does not show a cause of action against the defendant. A person riding a bicycle upon the public highway has the same rights in so doing as persons using other vehicles thereon. A highway is intended for public use, and a person riding or driving a horse has no rights superior to those of a person riding a bicycle. In the use of a public highway, there are certain rights of the road which must be observed by all persons, and a violation of those rights constitutes actionable negligence. Bicycles are vehicles used now very extensively for convenience, recreation, pleasure, and business, and the riding of one upon the public highway in the ordinary manner as is now done is neither unlawful nor prohibited, and they cannot be banished because they were not ancient vehicles, and used in the Garden of Eden by Adam and Eve. Because the plaintiff chose to drive a horse hitched to a carriage does not give to him the right to dictate to others their mode of conveyance upon a public highway, where the rights of each are equal. The traveled grade where the parties met was from ten to twelve feet wide, giving ample room for the parties to have passed each other. Gen. St. 1878, ch. 14, sec. 1, provides that when persons meet each other on any bridge or road, traveling with carriages, wagons, sleds, sleighs, or other vehicles, each shall seasonably drive his carriage or other vehicle to the right of the middle of the traveled part of the road, so that the respective carriages may pass each other without interference. This law appears to have been complied with on the part of the defendant. If there was room to pass, it was as much the duty of the plaintiff to stop as that of the defendant; especially in view of the fact that he testified that, when he discovered defendant riding towards him, he anticipated that his horse would be frightened.

In his complaint the grounds of negligence charged are that defendant did not stop riding towards plaintiff, and ascertain whether plaintiff's horse was likely to be frightened, and by riding upon the road grade before plaintiff had time to drive off the same. As the defendant had the legal right to be in the highway, and there is no allegation in the complaint that the defendant knew, or had any reason to believe or anticipate, that plaintiff's horse would be frightened at defendant's bicycle, or the manner in which he was riding the same, it does not charge actionable negligence. It is not the duty of a party lawfully traveling upon a public highway upon a bicycle, when he sees a

horse and carriage approaching, to stop and inquire whether the horse is likely to be frightened, nor to anticipate that such horse will be frightened, especially in the absence of any apparent reason for so doing; and it appears from the evidence that defendant was within five or ten feet of plaintiff's horse when he noticed that the horse was frightened. When he first saw plaintiff, he was about seventy or one hundred feet away from him, and riding at the rate of eight miles an hour; but, to use his expression, he slowed up, and turned out to the edge of the road next to the grass on the right side of the road, and only went the length of the plaintiff's horse before he dismounted, and went to the assistance of plaintiff, and rendered him such assistance as he was able. There is not a single word of evidence going to show any wilful act of tort on the part of defendant, or that he was riding his vehicle in any other than the ordinary way and reasonable manner, or that he apprehended or anticipated any fright on the part of plaintiff's horse. Simply because the plaintiff's carriage was injured by reason of his horse becoming frightened at defendant's riding his vehicle does not impute negligence to defendant. If defendant's act was not wrongful, the resulting injury was not actionable. The plaintiff cannot be made to pay or suffer for his acts, unless the acts done by him were done in such manner and at a time which show that he was acting in disregard of the rights of other persons. This is not such a case.

The pleading and proof of a custom as to parties approaching each other on the grade where this injury resulted are so wanting in stating and proving all the essential elements necessary that we need not discuss this question.

The judgment appealed from is affirmed.

#### NOTES OF MISSISSIPPI CASES RELATING TO COLLISIONS AND CROSSINGS.

Among the Mississippi cases arising out of accidents at crossings, collisions, or persons injured on track, are the following:

*Person loading cars on track injured in collision — Punitive damages.*

In NEW ORLEANS, JACKSON & GREAT NORTHERN RY CO v. BAILEY, 40 Miss. 395 (1866), it appeared that "defendant in error, by contract with the Central R. R. Co., had the right to use a certain portion of the side track for the purpose of loading and unloading freight. Plaintiffs had the right to use the same side

track, when nothing was in the way. While defendant was engaged in unloading cars on this side track a train of cars of plaintiff in error, and in charge of one of their employees, came in collision with the car upon which defendant was standing, and seriously injured him. *Held*, that plaintiffs were liable in damages for the injury, though the employee may have given the usual signals that he was about to move a train of cars upon the side track." Judgment for plaintiff (Bailey) in Circuit Court of Madison county for \$12,000 was affirmed. The court (per HARRIS, J.) discussed the question of punitive damages and held that an instruction that the jury might award same in this case was properly given.

*Failure of traveler to exercise due care at crossing.*

In NEW ORLEANS, JACKSON & GREAT NORTHERN R. R. CO. *v.* MITCHELL, 52 Miss. 808 (1876), judgment for plaintiff for \$400 was reversed, the syllabus to the official report stating the case as follows: "In an action against a railroad company for damages to the person of the plaintiff, it is proper to inquire whether the plaintiff was guilty of such contributory negligence as would forfeit his right to recover of the company for the neglect of its servants; and where the evidence tends to show such negligence on the part of the plaintiff, the jury should be instructed as to the law on that subject. It is a well-settled principle that it is negligence in a traveler crossing a railroad to do so without exercising his faculties to ascertain if there is danger in attempting to cross."

*Persons on track struck by train — Contributory negligence.*

VICKSBURG & MERIDIAN R. R. CO. *v.* MCGOWAN, 62 Miss. 682 (1885), person walking on track struck by train; judgment for plaintiff for \$4,000 reversed for erroneous admission of evidence tending to show intoxication of engineer, and misleading instructions.

MOBILE & OHIO R. R. CO. *v.* STROUD, 64 Miss. 784 (1887), plaintiff's intestate crossing track struck and killed by train; contributory negligence; judgment for plaintiff reversed.

LOUISVILLE, NEW ORLEANS & TEXAS R'y CO. *v.* COOPER, 68 Miss. 368 (1890), woman walking on trestle struck by train; contributory negligence; judgment for plaintiff for \$2,500 reversed.

DOOLEY *v.* MOBILE & OHIO R. R. CO., 69 Miss. 648 (1892), youth, nineteen years old, standing on edge of side track at depot where persons were not invited to go, struck by freight train; judgment for defendant affirmed.

CRAWLEY *v.* RICHMOND & DANVILLE R. R. CO., 70 Miss. 340 (1892), person crossing track struck and killed by train; contributory negligence; judgment for defendant.

CHRISTIAN *v.* ILLINOIS CENTRAL R. R. Co., 71 Miss. 237 (1893), person trespassing on track, walking along trestle, struck by train; judgment for defendant.

ILLINOIS CENTRAL R. R. Co. *v.* LEE, 71 Miss. 895 (1894), woman crossing switch used as footway, struck by backing train; contributory negligence; judgment for plaintiff reversed.

*Contributory negligence while crossing track.*

WINTERTON *v.* ILLINOIS CENTRAL R. R. Co., 73 Miss. 831 (1896), justice of the peace, after leaving court-house on side of track, struck by a gravel train; contributory negligence; peremptory instruction to find for defendant affirmed; suggestion of error overruled.

*Running or flying switch at crossing — Person injured on track — Railroad liable.*

IN ALABAMA & VICKSBURG R'Y Co. *v.* SUMMERS, 68 Miss. 566 (1891), colored woman carrying bundle on head walking on track and struck by train making running or flying switch; judgment for plaintiff for \$1,250 was affirmed.

In the SUMMERS case, *supra*, it was held to be "negligence *per se* for a railroad company to make a flying switch across the streets of a town along which persons are constantly accustomed to walk." Citing FULMER *v.* ILLINOIS CENTRAL R. R. Co., 68 Miss. 355 (1890), where judgment for defendant was reversed in action for negligent killing of plaintiff's husband while upon defendant's track by train making flying switch over public crossing.

*Car making "flying switch" — Person crossing switch track injured.*

ALABAMA & VICKSBURG R'Y Co. *v.* JONES, 73 Miss. 110 (1895), person standing upon or going across switch track of defendant run over by car making "flying switch;" judgment for plaintiff affirmed.

*Train at crossing — Opening between cars — Sudden closing of cars — Railroad liable.*

LOUISVILLE, NEW ORLEANS & TEXAS R. R. Co. *v.* THOMPSON, 64 Miss. 584 (1887), person passing through opening between cars of freight train standing at crossing at depot, the opening being made by railroad company for people to pass; railroad liable for sudden closing of cars inflicting injury upon plaintiff; judgment for plaintiff for \$15,000 affirmed.

See also BARDWELL *v.* MOBILE & OHIO R. R. Co., 63 Miss. 574; VICKSBURG & MERIDIAN R. R. Co. *v.* ALEXANDER, 62 Miss. 496 (attempting to cross track with horse and buggy in front of train standing at crossing; horse frightened; railroad liable).

*Collision between vehicle and train at crossing.*

ALABAMA & VICKSBURG R'y Co. v. DAVIS, 69 Miss. 444 (1891), person riding in buggy injured in collision of vehicle with train at crossing; negligence of driver not imputable to person riding; judgment for plaintiff for \$2,000 affirmed.

MEMPHIS & CHARLESTON R. R. Co. v. JOBE, 69 Miss. 452 (1891), collision between train and wagon at street crossing; judgment for plaintiff reversed for erroneous instructions as to negligence. See subsequent decision in the Jobe case, 71 Miss. 734 (1894), where judgment for defendant was affirmed.

LOUISVILLE, NEW ORLEANS & TEXAS R'y Co. v. FRENCH, 69 Miss. 121 (1891), plaintiff, twenty years old, driving wagon, struck by freight train while crossing track; judgment for plaintiff for \$500 reversed.

*Horse frightened at noise of train hands at crossing.*

MCCERRIN v. ALABAMA & VICKSBURG R'y Co., 72 Miss. 1013 (1895), horse frightened at noise of train hands on handcar running over street crossing, and person driving injured; railroad not liable.

*Mail agent injured in collision.*

NEW ORLEANS, JACKSON & GREAT NORTHERN R. R. Co. v. ALBRITTON, 38 Miss. 242 (1859), mail agent injured in collision between trains; judgment for plaintiff for \$10,000 reversed for erroneous instruction as to plaintiff's testimony.

*Attempting to avoid impending collision.*

ALABAMA & VICKSBURG R'y Co. v. PHILLIPS, 70 Miss. 14 (1892), person riding in vehicle jumping from same to avoid impending collision with train, and injured; judgment for plaintiff reversed.

RICHMOND & DANVILLE R. R. Co. v. BURNS, 70 Miss. 437 (1892), person leaping from freight train to avoid collision; judgment for plaintiff reversed.

*Accidents to children on track.*

JAMISON v. ILLINOIS CENTRAL R. R. Co., 63 Miss. 33 (1885), child killed on railroad track; judgment on verdict directed for defendant reversed; question whether child was seen by defendant's servants was fact for jury to determine from evidence.

LOUISVILLE, NEW ORLEANS & TEXAS R'y Co. v. HIRSCH, 69 Miss. 126 (1891), children crossing track at depot struck by train backing; judgment for plaintiff for \$1,800 affirmed.

MOBILE & OHIO R. R. Co. v. WATLY, 69 Miss. 145 (1891), child

four years old, crossing trestle, killed by train; judgment for plaintiff reversed for contributory negligence of parent.

LOUISVILLE, NEW ORLEANS & TEXAS R'Y Co. *v.* WILLIAMS, 69 Miss. 631 (1892), child playing near railroad going on track and lying down to sleep, run over by train; judgment for plaintiff reversed.

ALABAMA & VICKSBURG R'Y Co. *v.* LOWE, 73 Miss. 203 (1895), child, in custody of servant, run over and killed while crossing track; negligence of servant not imputable to child; judgment for plaintiff for \$2,250 affirmed

*Animals injured on track.*

Among the numerous cases arising out of injuries to animals on railroad tracks, see the following:

RAIFORD *v.* MISSISSIPPI CENTRAL R. R. Co., 43 Miss. 233 (1870), horses killed on railroad track; railroad not liable.

VICKSBURG & JACKSON R. R. Co. *v.* PATTON, 31 Miss. 156-198 (1856), horses killed on track; railroad liable; the rights and liabilities of railroad companies as to condition of track and injuries to cattle thereon fully discussed. It was also held that "the jury may allow exemplary damages against a railroad company, if it appear that plaintiff's property was destroyed or injured by gross negligence or wilful or wanton mischief of its agents."

MISSISSIPPI CENTRAL R. R. Co. *v.* MILLER, 40 Miss. 45 (1866), mule on track killed in collision with train; judgment for plaintiff reversed for erroneous instructions as to care required of railroad.

MOBILE & OHIO R. R. Co. *v.* GUNN, 68 Miss. 366 (1890), mule killed on track; judgment for plaintiff affirmed.

YAZOO & MISSISSIPPI VALLEY R. R. Co. *v.* SMITH, 68 Miss. 359 (1890), colt killed while on track; judgment for plaintiff reversed, there being nothing to show wanton conduct of engineer in running over animal.

See also CHICAGO, ST. LOUIS & NEW ORLEANS R. R. Co. *v.* PACKWOOD, 59 Miss. 280; NEW ORLEANS, MOBILE & TEXAS R. R. Co. *v.* TOULME, 59 Miss. 284; MEMPHIS R. R. Co. *v.* ORR, 43 Miss. 279; YAZOO & MISSISSIPPI VALLEY R. R. Co. *v.* WHITTINGTON, 74 Miss. 410; R. R. Co. *v.* BRUMFIELD, 64 Miss. 637; R. R. Co. *v.* THORNTON, 65 Miss. 256; R. R. Co. *v.* BOURGEOIS, 66 Miss. 3; ROBERDS *v.* MOBILE & OHIO R. R. Co., 74 Miss. 334; R. R. Co. *v.* JONES, 59 Miss. 470; MOBILE & OHIO R. R. Co. *v.* WEEMS, 74 Miss. 513; ILLINOIS CENTRAL R. R. Co. *v.* WEATHERSBY, 63 Miss. 581; R. R. Co. *v.* DOGGETT, 67 Miss. 250; R'Y Co. *v.* SMITH, 67 Miss. 15; R. R. Co. *v.* FIELD, 46 Miss. 573; HOWARD *v.* R. R. Co., 67 Miss. 247; TYLER *v.* R. R. Co., 61 Miss. 445; BEDFORD *v.* R. R. Co., 65 Miss. 385; KENT *v.* R'Y Co., 67 Miss. 608; R. R. Co. *v.* HUDSON, 50 Miss. 572.

## HUNT v. MISSOURI RAILROAD COMPANY AND T. C. HIGGINS.

*Supreme Court, Missouri, October Term, 1886.*

[Reported in 89 Mo. 607.]

**APPEAL — SUPREME COURT — PRACTICE.** — It is error to submit an issue to the jury where there is an entire want of evidence to support it.

**STATUTE — JUDGMENT — JOINT TORT FEASORS.** — Under the Statutes of 1879, sec. 3776, the Supreme Court may reverse or affirm judgment of Circuit Court or give such judgment as it may consider should have been given by the Circuit Court, and may reverse judgment as to one of two defendants and affirm same as to the other defendant.

**APPEAL** from St. Louis Court of Appeals. *Judgment reversed* as to the Missouri Railroad Company, and *affirmed* as to T. C. Higgins. See the case reported in 14 Mo. App. 160 (1).

DYER, LEE & ELLIS, for appellants.

JOHN WICKHAM, for appellant, Higgins.

W. C. & J. C. JONES and A. R. TAYLOR, for respondent.

**Ray, J.** — This cause was before the St. Louis Court of Appeals, and is reported in 14 Mo. App. 160.

The point most pressed at the oral argument before us, and in the brief of counsel for the railroad company, and the one we think of most importance, as to it, is whether there is sufficient evidence of negligence on its part to go to the jury. A similar objection was also raised and urged by counsel for defendant Higgins, as to him. We have carefully considered the evidence, and especially with reference to this objection. The majority of the court are of opinion that as to the defendant, Missouri Railroad Company, there is no sufficient evidence, or rather,

1. The facts in the case at bar (HUNT v. Mo. R. R. Co., *et. al.*), as reported in 14 Mo. App. 160 (1883), tended to show that the action was brought by plaintiff under R. S., §§ 2121 and 2122, for damages sustained in the killing of her husband, while he was riding on a street car of the defendant corporation; that the defendant, Higgins, was engaged in erecting buildings on a street through which the street car passed, and was using a movable derrick for the purpose, that the guy

rope was caught by the street car which pulled the derrick over and the scantling fell upon the rear platform of the street car upon which plaintiff's husband was riding and killed him. There was a verdict for \$5,000 in favor of plaintiff, and judgment was rendered against both defendants. On appeal judgment was affirmed, and on appeal to the Supreme Court (89 Mo. 607), judgment was reversed as to the railroad company, and affirmed as to defendant Higgins.

there is an entire want of evidence of negligence on its part, authorizing the submission of the cause to the jury, and that as to it the judgment of the trial court, as well as that of the Court of Appeals, is erroneous and should be reversed; and it is accordingly so ordered. In this conclusion and disposition of the case, as to this defendant, Norton, J., and myself do not concur.

As to the defendant, Higgins, after a careful examination of the entire evidence, we see no sufficient reason to doubt that the conclusion arrived at by the trial court, as well as the Court of Appeals, is correct, and that the case made by the evidence, was as to him one for the jury to pass on. Perhaps it is well to say that we do not mean to be understood as committed to an approval of some of the expressions which occur in the progress of the opinion of the Court of Appeals, as to what the disaster, in and of itself, may indicate to a practical-minded jury, or as to what the juror in his practical familiarity with current events and with their physical and moral causes may legitimately consider whatever the witness may say. The other questions made by the defendant Higgins, or involved in the case in his behalf, we have also considered, and in our opinion they also are properly considered correctly disposed of by the Court of Appeals in its said opinion, and they need not be restated or re-argued by us. Finding no material error in the decision of the Court of Appeals as to the defendant Higgins, the judgment as to him is affirmed.

Section 3776, Revised Statutes of 1879, provides that: "The Supreme Court in appeals or writs of error shall examine the record and award a new trial, reverse or affirm the judgment or decision of the Circuit Court, or give such judgment as such court ought to have given as to them shall seem agreeable to law." In reversing the judgment as to one of the defendants, and affirming it as to the other, as we have done in this case, we think we have thereby given such judgment as the lower courts under the facts and law of the case ought to have given. In a case like this the ends of justice do not require that the whole case should be reversed and remanded, for further proceedings. In numerous instances this court has modified and affirmed judgments as seemed to it agreeable to law and justice. *Wescott v. Bridwell*, 40 Mo. 146; *Miller v. Hardin*, 64 Mo. 545; *Mueller v. Kaessman*, 84 Mo. 330; *Central Law Journal* for June, 1886, page 553.

In this branch of the case all the judges concur.



## RAPP v. ST. JOSEPH AND IOWA RAILROAD COMPANY.

*Supreme Court, Missouri, Division No. 1, October Term, 1891.*

[Reported in 106 Mo. 423.]

**PERSON DRIVING KILLED AT RAILROAD CROSSING — DAMAGES — STATUTE.** — In an action to recover damages for the negligent killing of a person by defendant's engine at a public crossing, it was held error in the Circuit Court to sustain a recovery for \$5,000, based on a finding of negligence not embraced within R. S. 1889, § 4425, as the fixed sum of \$5,000 is only recoverable of a railway company when the death of a person, not a passenger, is caused by the negligence of the company's servants "while running, conducting or managing any locomotive, car or train of cars."

Following *CRUMPLEY v. HANNIBAL & ST. JOSEPH R'y Co.*, 98 Mo. 34 (1).

**CONTRIBUTORY NEGLIGENCE.** — Where there was evidence tending to show contributory negligence, it was error to charge that "the law presumes deceased did exercise ordinary care" (2).

**APPEAL** from the Buchanan Circuit Court. *Judgment for plaintiff for \$5,000 reversed.*

"This is an action by the widow of Henry Rapp for statutory damages on account of his death. He was struck and killed by an engine of defendant, at a public road crossing in Buchanan county, in 1887.

"The petition charged (among other items) negligence, in that 'at the time of the construction of said railroad, and at a point where the same passes through a deep cut near to said crossing, said defendant negligently caused banks of dirt to be thrown up alongside of said railroad, on its right of way and near thereto,

1. The syllabus to the official report of *CRUMPLEY v. HANNIBAL & ST. JOSEPH R'y Co.*, 98 Mo. 34 (1888), states the case as follows: "The wrongful death of a person at a railroad crossing, occasioned by the negligence of the company's servants in failing to ring the bell or sound the whistle, comes within the provisions of R. S. 1879, § 2121, and, where an action can be maintained by the representatives designated therein, the measure of damages is \$5,000. But where the death results from the failure of the company to maintain a lawful crossing, the case

does not come within R. S. 1879, § 2121, and it is error to direct a verdict for \$5,000. Where the petition charges negligence in failing to ring the bell, or sound the whistle, and also failure to construct and maintain a lawful crossing, and it cannot be told upon which ground the jury based their verdict for \$5,000, the judgment will be reversed."

2. See notes of Missouri cases, at end of this case, relating to collisions between trains and vehicles at crossings.

and on top of the banks of said cut, which had been negligently allowed by defendant to remain at the place aforesaid since the construction of said railroad; that, for more than one year before the injuries alleged, said defendant did negligently allow to stand alongside of said railroad on its right of way brush, weeds, and other obstructions; that alongside of said public road, which said Henry Rapp was traveling in approaching said crossing, and at the time of the injuries herein mentioned, and for more than one year prior thereto, there stood a hedge fence and other obstructions, all of which were calculated to, and did, as defendant then and there well knew, hinder persons traveling along said public road from seeing or hearing trains of cars on said railroad approach said crossing.'

"Then follow the charges of negligence in omitting to ring bell or blow whistle; the death of Mr. Rapp, etc.

"The answer, in addition to a general denial, pleaded contributory negligence.

"The trial disclosed these facts: Mr. Rapp was well acquainted with the crossing. At the time of the accident he was alone, in a farm wagon, drawn by a span of mules, going eastward from the city of St. Joseph, along a public road, running east and west. He was on his way home. His wagon was struck by the engine of one of defendant's passenger trains, at a point six or seven miles east from the city, where the public road upon which he was traveling crosses the track of defendant's railroad.

"The railroad track there extends in a northwesterly and southeasterly direction, running further east than south. The crossing is at the east end of a cut. The railroad track extends from the crossing northwesterly through the cutting six or eight hundred feet, then emerges upon an embankment and crosses a trestle bridge (at the west end of which stands the 'whistling post,' fourteen hundred and fifty feet from the crossing), and passes into another cut known as the 'Saxton cut' beyond. Before entering the last-mentioned cut, it begins to curve to the southward, and continues to curve until it runs in a westerly direction.

"The public road runs west from the crossing over the hill, through which the railroad is cut. As it goes from the railroad up the hill it also passes through a cut. Along the north side of this road from the right of way westward, for a quarter of a

mile, a hedge extended eight or nine feet high, at the time of the accident. Along the top of the railroad cut, and six or eight feet from the edge of the slope on the railroad right of way, piles of earth taken from the cutting when the railroad was built had been deposited.

" Mr. Rapp was killed by a passenger train, going east at a speed of about twenty-eight or thirty miles per hour, except as modified by efforts to stop, after he was discovered. The plaintiff's evidence tended to prove that no signal of bell or whistle was given of the train's approach.

" There was evidence tending to show that there was a growth of weeds on top of the slope of the railroad cutting, on the north side of the public road.

" In the direction from which Rapp was coming there was a point in the public road twenty-eight rods from the railroad, from which a man, seated in a wagon, could see a train for a short distance, as it emerged from the Saxton cut and entered the cut terminating at the place of the accident.

" From that point to the point where the public highway entered the cutting leading down the hill to the railroad track, the railway was hidden from the traveler by a thick hedge, eight or nine feet high, in full foliage. Until reaching a point very close to the track no view toward the west could be had along it by the deceased, or other person approaching from that side.

" It will not be necessary to give the full particulars of the testimony, as will appear later from the view taken of some parts of the case.

" The court, among other instructions, gave the following: ' 8. The court instructs the jury that it was the duty of defendant to construct and maintain its railroad and the approaches thereto, free from such obstruction as would prevent or hinder persons attempting to cross said railroad at the public-road crossing mentioned in evidence from seeing or hearing the approach of trains on said railroad, and the court instructs the jury that if they find from the evidence that defendant placed banks or piles of dirt along or near its railroad, or negligently allowed the same to be and exist on its right of way, or negligently permitted weeds, brush, or other obstructions to exist on its right of way which it did not cut off, which obstructed or hindered Henry Rapp from seeing or hearing the approach of the train mentioned in the evidence, and on account thereof, while said Henry Rapp

was using ordinary care in attempting to cross said railroad, he was run over and killed by said train of cars, then the jury must find for plaintiff.'

" ' 10. The court instructs the jury that if they find for the plaintiff they will assess the damages at \$5,000.'

" The judgment was for plaintiff in the amount of \$5,000, after verdict to that effect; and after the usual motions, etc., the defendant appealed."

BROWN & CRAIG, for appellant.

SPENCER, BURNS & MOSMAN, for respondent.

**Barelay, J.** — This action was brought under the damage act (R. S. 1889, ch. 49), for the negligent killing of Henry Rapp, the late husband of plaintiff.

The judgment in the trial court cannot be supported in view of several recent decisions here.

I. The case was submitted to the jury so as to authorize a verdict for plaintiff in the sum of \$5,000, if the jury found that the death of the plaintiff's husband resulted from negligence of the defendant in permitting weeds, brush, or other obstructions to exist on its right of way near the public crossing at which Mr. Rapp was killed. The fixed sum of \$5,000 is only recoverable of a railway company when the death of some individual (not a passenger), is caused by the negligence of the company's servants " whilst running, conducting, or managing any locomotive, car, or train of cars."

When such death results from other actionable negligence than that just mentioned (R. S. 1889, § 4426), the jury should assess the damages at a sum " not exceeding \$5,000," as prescribed in § 4427, R. S. 1889.

This was expressly decided in *Crumpley v. Hannibal & St. Joseph R. R. Co.*, 98 Mo. 34 (1888), and must now be accepted as the settled law (1).

It was, therefore, error in the Circuit Court to sustain a recovery for \$5,000, based on a finding of negligence not embraced within the range of § 4425, R. S. 1889.

II. The court furthermore instructed that " the law presumes deceased did exercise such " (ordinary) " care," in the face of abundant proof from which (to put it mildly) the jury might reasonably have found the deceased negligent. That line of

1. See abstract of the *Crumpley* case, on page 190, *ante*.

instruction was disapproved in *Moberly v. Kansas City, St. J. & C. B. R. R. Co.*, 98 Mo. 183 (1889), and there is nothing in this case to repel the application of the ruling made in that just cited (1).

We need not pause to consider the other points urged on this appeal.

The errors already mentioned are such as necessitate the reversal of the judgment, which is accordingly ordered, and the cause remanded for further proceedings, with the assent of all the judges of this division.

#### NOTES OF MISSOURI CASES RELATING TO COLLISIONS BETWEEN TRAINS AND VEHICLES AT CROSSINGS.

Among the cases (other than those reported with the Missouri cases in this volume of *AM. NEG. CAS.*), relating to collisions between trains and vehicles, are the following:

##### *Collisions at crossings.*

*FLETCHER v. ATLANTIC & PACIFIC R. R. Co.*, 64 Mo. 484 (1877), collision between wagon and train at crossing; person riding injured; failure to look and listen; judgment for plaintiff reversed for contributory negligence.

*HENZE v. ST. LOUIS, KANSAS CITY & NORTHERN R'y Co.*, 71 Mo. 636 (1880), plaintiff's husband and infant son killed in collision with train at crossing while driving across track; judgment for plaintiff for \$10,000 reversed for contributory negligence.

*PURL v. ST. LOUIS, KANSAS CITY & NORTHERN R'y Co.*, 72 Mo. 168 (1880), deaf person driving across track struck by train; contributory negligence; judgment for plaintiff reversed.

*WELSCH v. HANNIBAL & ST. JOSEPH R. R. Co.*, 72 Mo. 451 (1880), collision between wagon and train at crossing; judgment for plaintiff reversed.

*TURNER v. HANNIBAL & ST. JOSEPH R. R. Co.*, 74 Mo. 602 (1881), collision between wagon and train at crossing; contributory negligence; judgment for plaintiff reversed.

*POPE v. KANSAS CITY CABLE R'y Co.*, 99 Mo. 400 (1889), collision between wagon and cable car; judgment for plaintiff reversed for erroneous instructions.

*BECKE v. MISSOURI PACIFIC R'y Co.*, 102 Mo. 544 (1890), passenger in hack fatally injured in collision with train at crossing; judgment for plaintiff for \$5,000 affirmed.

1. In *MOBERLY v. KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS R. R. Co.*, 98 Mo. 183 (1889), it was held (as per syllabus to the official report), that "the presumption that every one exercises ordinary care obtains, in the absence of evidence to the contrary. But in an action against a railroad company for damages for personal injuries, where there was abundant evidence from which plaintiff's negligence might have been found, an instruction that the presumption of ordinary care existed in his favor was calculated to mislead the jury and should not have been given."

The *MOBERLY* case was an action for injuries sustained in collision between wagon and train at crossing. Judgment for plaintiff reversed. See also 17 Mo. App. 518.

KING *v.* MISSOURI PACIFIC R'Y Co., 98 Mo. 235 (1889), person killed while driving across track; judgment for plaintiff for \$5,000 reversed.

TETHEROW *v.* ST. JOSEPH & DES MOINES R. R. Co., 98 Mo. 74 (1888), person thrown from wagon and fatally injured by reason of alleged defective crossing; judgment for plaintiff for \$2,900 affirmed.

O'CONNOR *v.* MISSOURI PACIFIC R'Y Co., 94 Mo. 150 (1887), person crossing track killed by train making flying switch; judgment for plaintiff for \$5,000 affirmed.

## HUDSON *v.* WABASH WESTERN RAILWAY COMPANY.

*Supreme Court, Missouri, In Banc, June, 1894.*

[Reported in 123 Mo. 445.]

**TRAIN STANDING AT CROSSING — PASSING BETWEEN CARS — CONTRIBUTORY NEGLIGENCE.** — In an action to recover damages for injuries sustained by plaintiff who, in attempting to pass between cars which were standing at street crossing longer than was permitted by city ordinance, stepped on pinhead of car and was injured by the cars being backed together, no warning having been given of such backing of cars, it was held that plaintiff assumed the obvious risks involved in so climbing over the cars, and judgment of nonsuit affirmed (1).

BLACK, Ch. J., *dissented*.

**APPEAL** from St. Louis City Circuit Court. The facts appear in the opinion. *Judgment of nonsuit affirmed.*

SMITH P. GALT, for appellant.

F. W. LEHMANN and GEORGE S. GROVER, for respondent.

**Per Curiam.** — This is an action for personal injuries in which plaintiff was obliged to take a nonsuit with leave, etc., by reason of the ruling of the trial court, in giving an instruction in the nature of a demurrer to the evidence, at the close of his case.

It is the same action reported on a former appeal, 101 Mo. 13.

Plaintiff's petition alleges negligence on the side of defendant in failing to obey certain ordinances of the city of St. Louis, where his injury occurred, and in carelessly operating its cars, etc.

The answer contained a general denial, and a plea of contributory negligence, which was put at issue by plaintiff's reply.

1. See former decision in the HUDSON MOUNTAIN & SOUTHERN R'Y Co., 105 case, 101 Mo. 13 (1890), where the facts Mo. 399 (1891), person injured climbing over stationary cars at crossing; plaintiff fully stated and judgment for plaintiff reversed on the ground of contributory negligence; judgment for plaintiff reversed, following the ruling in the HUDSON case, 101

See also CORCORAN *v.* ST. LOUIS, IRON Mo. 13.

The cause came to trial before Judge Klein and a jury.

Plaintiff introduced certain municipal ordinances of St. Louis, forbidding the moving of locomotives, cars, etc., without constant sounding of the engine bell; forbidding the running of cars moved by steam across or along any improved street, without having a watchman at each street crossing, etc.; forbidding the obstruction of any street crossing by a train for more than five minutes; requiring a backing car to have a man stationed on the end farthest from the engine to give danger signals; and requiring all freight trains, moving in the city limits, to be manned with experienced brakemen, stationed so as to see the danger signals and hear the signals from the engine.

The plaintiff then testified in his own behalf. The substance of his evidence is as follows:

On the eighteenth day of November, 1887, he was working at Schulenburg & Boeckler's saw mill, situated east of defendant's railroad tracks. He was one of a gang whose duty it was to keep the lumber cleared away from the men who worked on the top floor of the mill.

He lived west of the tracks. At twelve o'clock, noon, he went home to dinner, passing west on Montgomery street, which was macadamized on both sides of the railroad tracks. At that time there were no cars standing across Montgomery street, but there were cars standing on each side of that street.

At twenty-nine minutes after twelve o'clock he left his home to return to the saw mill. As he passed out the 12:30 whistle blew.

His house was situated higher than the railroad track. He could see a long distance north and south. The cars of the defendant were then standing across Montgomery street. There was no locomotive connected with them when he left his yard. When he got to Montgomery street, two laboring men who worked east of the railroad tracks jumped up and passed over the cars and went on down Montgomery street.

Plaintiff waited on Montgomery street, west of the train until 12:40, when the saw-mill whistle blew, and he started to pass through between the cars, as the other two men had done. In his hurry he put one foot south of the pinhead and one north. Just then the cars were backed together and caught both of his feet but he jerked one out, and the other was badly mashed. He hung there for about a minute and then fell east of the track, and lay on the ground until one o'clock, when the train pulled

north. So much of it was moved as was north of a point distant the length of a car and a half south of Montgomery street. The remainder of the train, from that point south for three blocks, was left standing.

While he was there, no brakeman was on the rear part of the train. There was no watchman at Montgomery street.

This track on which the train had been standing was the fifth track from the west. There was about a dozen tracks there. The track on which plaintiff was hurt was used for loaded freight trains, or was what is commonly known as a switch or side track.

There was no warning or signal of any kind given, that the train was going to move.

Plaintiff was confined to his bed for nine weeks, suffered excruciating pain, and is maimed for life.

It was admitted by defendant at the trial that the cars were moved by a locomotive.

Some other witnesses testified to the manner in which the tracks were used by the defendant at the place of the accident.

At the close of plaintiff's evidence, the court forced him to a nonsuit, by the ruling already mentioned, declaring that he had no case to submit to a jury.

We think the trial court was right in so ruling, on the ground that plaintiff's own testimony disclosed so clearly his own negligence, directly contributing to the injury, as to permit no reasonable inference of proper care on his part in the circumstances.

In climbing over the cars, he put his feet in such a position that they were bound to be caught if the cars were moved. He knew at the time full well that the cars had been standing there longer than was permitted by the ordinance.

They were likely to move at any time, and should have moved before they did.

In getting over the cars in the way plaintiff attempted to do, he must be held to have taken the obvious risks involved in that act.

Irrespective of any question whether defendant was negligent in failing to obey the ordinance quoted, or otherwise, we think it too plain for extended argument that plaintiff was not sufficiently free of fault, directly contributing to his mishap, to warrant the submission of his case to the jury.

This court so held on the former appeal (101 Mo. 13), and we



consider that the trial court correctly applied the law then declared.

The judgment is affirmed, in which all concur, except BLACK, Ch. J., who dissents,

## BROWN v. HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

*Supreme Court, Missouri, August Term, 1872.*

[Reported in 50 Mo. 461.]

TRAIN STANDING AT CROSSING — PEDESTRIAN INJURED CROSSING TRACK — DUTY AND LIABILITY OF RAILROAD COMPANY. — Railroad companies are held to the greatest care in the operation of their trains, and where a person is injured at a crossing, although unlawfully there and guilty of contributory negligence, and the injury might have been avoided by the railroad company by the use of ordinary care on its part, the injured person may recover damages against the company.

So held, in action for injuries sustained by plaintiff who was run over by defendant's train at a place on track near crossing which was used by the public occasionally, the street crossing being obstructed by defendant's train which was standing there (1).

APPEAL from Clinton Circuit Court. The facts appear in the opinion. *Judgment for plaintiff affirmed.*

HALL & OLIVER, for appellant.

WM. HENRY, JR., for respondent.

**Wagner, J.** — This was an action commenced in the court below by the plaintiff for the purpose of recovering damages for personal injuries. It appears from the record that the plaintiff was in the town of Cameron, and wanted to cross the street where the defendant's track was laid upon the same; that before she arrived at the crossing she discovered that a train of cars was standing upon the track and the crossing was obstructed, so that she could not pass at that place. She then turned and crossed the track at a different place, where there was no public crossing, but there was a path where people were accustomed to cross occasionally, but it does not seem that the road had ever authorized anybody to cross at that particular place. When plaintiff went on the track there was an engine and tender standing about

1. See notes of Missouri cases, at end of this case, relating to pedestrians injured while crossing tracks.

six feet distant, and as she had nearly crossed over, the cars commenced moving and the tender struck her, the wheels passing over one of her legs, just above the ankle, crushing it so that amputation became necessary. She swears that no signal was given of the moving of the train, and the first notice she had of the cars moving was being struck by them. There was other evidence tending to prove that no bell was rung when the engine was started. On the other hand, there was evidence going to show that at the time the train was started the bell was rung and the alarm was given. Upon this state of facts the court made the following declarations of law for the plaintiff:

" 1. If the jury believe from the evidence that the defendant, through the negligence or carelessness of its agents, and without negligence of plaintiff, inflicted upon the plaintiff the injury as mentioned in the petition, they will find for the plaintiff.

" 2. Railroad companies, owing to the dangerous character of the business they engage in, are held to the greatest care in the operation of their machinery and vehicles; and if the jury believe from the evidence that the defendant's agents or servants, in managing the locomotives or other machinery, failed to use such care and caution, by which the injury was done to plaintiff, they will find for plaintiff.

" 3. Even if the jury should believe from the evidence that the plaintiff was guilty of negligence or carelessness which contributed to the injury, yet if they further believe from the evidence that the agents or servants of defendant, managing the locomotives or machinery of the defendant, with which the injury was inflicted, might have avoided the said injury by the use of ordinary care and caution, the jury will find for plaintiff."

The court gave all the instructions asked for by the defendant, except the sixth, which is as follows:

" 6. If the jury believe from the evidence that the injury in proof happened on the railroad track of defendant, and where there was no street or road crossing, the plaintiff cannot recover, because the defendant in the use of its road is not bound to keep a lookout on its own ground, as against those who have no lawful right there, but may use the same for its own lawful purposes; and any one going on said track where there is no street or road crossing is there at his own peril and in his own wrong, and therefore cannot recover, because his own wrong has contributed to his own injury."

The point raised in this court, that the evidence did not correspond with the petition, we do not think can be maintained. The allegation in the petition was that the injury occurred at a public crossing, and the proof showed that it happened at a private crossing; but no objection was made to it on that account in the court below, and no advantage was attempted to be taken in the manner pointed out by statute. *Fischer v. Max et al.*, 49 Mo. 404; Wagn. Stat. 1033, § 1.

With the weight of testimony we have nothing to do. It is sufficient for us that both parties introduced evidence tending to prove their respective allegations. The authorities mostly cited and relied on by the defendant are from courts where the established law is that the courts themselves determine what is negligence, and take the case from the jury when in their own opinion the evidence shows that the plaintiff has been guilty of any carelessness or negligence which contributed to the accident. But in this State a different rule prevails, and where there is any evidence in regard to the issues, the question of negligence must be submitted to the jury under instructions from the court.

To the first instruction given to the jury at the instance of the plaintiff no reasonable objection can be made. It makes the defendant liable if its agents carelessly and negligently inflicted the injury, without the plaintiff being guilty of any negligence which contributed thereto. In reference to the second instruction, as applied to this case, there is some doubt. It asserts a correct proposition of law, and if the plaintiff was legally and rightfully on the track, of its application there could be no question. But, owing to the peculiar and clearly proved facts, we think this instruction may very properly be considered in conjunction with the next succeeding or third instruction, which is entirely unobjectionable. *Huelsenkamp v. Citizens' Railway Co.*, 37 Mo. 537, 9 Am. Neg. Cas. 520; *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380, 47 Mo. 521.

The crossing was obstructed by the defendant's train, and the plaintiff, therefore, to pursue her journey, turned away and crossed it at another place where people were accustomed to cross, but it does not appear that they had any license therefor.

The defendant had the right to stop its trains at the crossing for a reasonable time, but when the train did stop and obstructed the crossing for the purpose of unloading cars, as was the case here, were travelers always obliged to wait before they could

continue their business, till the cars were unloaded? While the railroad company is the absolute owner of its track and has the right to its free and unmolested use, still it is not absolved from the exercise of ordinary care and diligence to prevent injury to others when they happen on the track under the circumstances in which the plaintiff was placed. Greater care and foresight must necessarily be used within the limits of a town than would be required in the country. In towns caution should always be used. There is no absolute rule as to negligence to cover all cases. That which is negligence in one case, by a change of circumstances will become ordinary care in another, or gross negligence in a third. Circumstances, time, and place must be taken into the account, and the relative degrees of care, or want of it, grow out of the surroundings and conduct of both parties. The degree of care required of persons having charge of locomotives and cars, upon tracks in towns, varies according to the circumstances of the case, and must be proportioned to the danger to be apprehended of inflicting injury upon others. The rule which would apply in one case, or at a certain given time, might be entirely inadequate as a test when applied to a different state of things. As the crossing was obstructed by the act of the defendant, and persons were in the habit of going over the private way, we think that the agents and servants of the defendant were bound to take notice of these facts, and use a precaution commensurate with them.

The instruction refused for the defendant proceeds upon the hypothesis that, as the plaintiff was on the road track where there was no road or street crossing, she cannot recover, whether the defendant was negligent or not. This proposition I admit has many authorities to support it. But a contrary doctrine was quoted approvingly in this court in *Huelsenkamp v. Citizens' Railway*, *supra*, where cases were cited to show that for an injury negligently inflicted the defendant might be held liable, though the plaintiff was a trespasser. See *Lynch v. Nurdin*, 1 Ad. & El. N. S. 29, per Lord Denman, C. J.; *Robinson v. Cone*, 22 Vt. 213; *Birge v. Gardiner*, 19 Conn. 507.

This principle springs immediately out of the common and familiar rule that every person shall use his own property so as not to hurt or injure another. It is in accordance with this principle that, though a person do a lawful thing, yet if any damage thereby befalls another which he could have avoided

reasonable and proper care, he shall make reparation. As before remarked, the defendant's right to the exclusive and unmolested use of its railroad track is undeniable. And we may concede for the argument that the plaintiff had no right to be on the track, and that she was there improperly, and still it does not follow that she cannot recover for an injury inflicted upon her negligently. The right of the defendant to the free, exclusive and unmolested use of its railroad is nothing more than the right of every other land proprietor in the actual occupancy and use of his lands, and does not exempt it from the duty enjoined by law upon every person so to use his own property as not to do any unnecessary or avoidable injury to another. The fact that one person is in the wrong does not in itself discharge another from the observance of due and proper care toward him, or the duty of so exercising his own rights as not to injure him unnecessarily. *Kerwhacker v. C. C. & C. R. R. Co.*, 3 Ohio St. 172.

The cases are numerous where parties have been held responsible for their negligence, although the party injured was, at the time of the occurrence, culpable, and, in some of the cases, in the actual commission of a trespass. Thus, in the *New Haven Steamboat and Transportation Co. v. Vanderbilt*, 16 Conn. 421, the Supreme Court of Connecticut held it to be a principle of law that while a party on the one hand shall not recover damages for an injury which he has brought upon himself, neither shall he on the other hand be permitted to shield himself from an injury which he has done because the party injured was in the wrong, unless such wrong contributed to produce the injury; and even then it would seem that the party setting up such defense is bound to use common and ordinary caution to be in the right.

In *Birge v. Gardiner*, 19 Conn. 507, the same court says: "There is a class of cases in which defendants have been holden responsible for their misconduct, although culpable acts of trespass by the plaintiffs produced the consequences." In the case of *Bird v. Holbrook*, 15 Eng. Com. Law, 91, it was held that where the defendant, who, for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house, and the plaintiff, having climbed over the wall in pursuit of a stray fowl, was shot, he, the defendant, was liable in damages, although the plaintiff brought the injury upon himself by trespassing upon the defendant's inclosures.

The case of *Vere v. Lord Cawdor*, 11 East, 568, was an action of trespass for shooting and killing a dog of the plaintiff's, in which it was held that a plea in bar constituted no justification. It set forth that the lord of the manor was possessed of a close, and that the defendant, as his gamekeeper, killed the dog when running after hares in that close for the preservation of hares, the plea not averring that it was necessary to kill the dog for the preservation of the hares, etc. In this case Lord Ellenborough, C. J., said: "The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground. And if there be any precedent of that sort, *which outrages all reason and sense*, it is of no authority to govern other cases."

To the same effect is the case of *The Mayor of Colchester v. Brooks*, 53 Eng. Com. Law, 376, cited in 1 Smith's Lead. Cas. 132, where it was held that although the plaintiff was chargeable with wrong and negligence in placing and keeping the deposit of a bed of oysters in the channel of a navigable stream, which created a public nuisance, yet the defendant was not justified in running his vessel upon the deposit, greatly injuring the oysters, when there was room to pass in the stream without it, and the injury could have been avoided by the use of reasonable care and diligence.

These authorities might be greatly multiplied, but a sufficient number have been cited to show the established rule. And in the Ohio case before referred to it is declared by the court that "where a party has in his custody or control dangerous implements or means of injury, and negligently uses them, or places them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury, he may be entitled to redress." This we think is fully as broad as the instructions given in this case. The sixth instruction asked by the defendant and refused by the court was properly refused.

The instructions given for the plaintiff, under all the circumstances of this case, when taken together were not objectionable, and furnish no reason for a reversal. The judgment in the court below having been for the plaintiff, will be affirmed. The other judges concur.

NOTES OF MISSOURI CASES RELATING TO PEDESTRIANS  
INJURED ON TRACK.

In addition to the cases reported with the Missouri cases in this volume of AM. NEG. CAS., relating to persons injured on railroad tracks, see the following:

*Stepping out from behind cars standing on track — Contributory negligence.*

In *HARLAN v. ST. LOUIS, KANSAS CITY & NORTHERN R. R. Co.*, 64 Mo. 480 (1877), the syllabus to the official report sufficiently states the case as follows: "A stranger, in stepping out from behind a train of cars standing upon the side track of a railroad, to cross another track seven feet removed, was run over by a pony engine and killed. The engine failed to ring the bell, but the locomotive could have been heard, while moving, at a distance of from 100 to 200 yards. The engineer did not see the deceased, but had he done so, could not have stopped the engine soon enough to prevent the accident; whereas the deceased could have both seen and heard the engine in time. Held that although the failure to ring the bell was negligence in law yet since the casualty was directly caused by the negligence of the deceased and after he stepped from behind the train, could not have been prevented by the engineer, the railroad company was not liable." *Judgment for plaintiff reversed.* Motion for rehearing overruled, 65 Mo. 22.

*Deaf person walking on track — Contributory negligence.*

In *ZIMMERMAN v. HANNIBAL & ST. JOSEPH R. R. Co.*, 71 Mo. 476 (1880), the facts, as stated in the syllabus to the official report, were as follows: "Plaintiff, a man of mature years, in his right mind, with his eyesight unimpaired, but deaf, without looking to see if a train was coming, went upon a railroad track and started down the track, when he was almost instantly struck and injured by a train approaching from behind. A short distance before reaching the track he passed a point where the train was in full view; and a sidewalk for the use of pedestrians ran alongside the track. Held, a case of negligence precluding recovery against the railroad company, for the injuries sustained." *Judgment for plaintiff for \$4,000 reversed.*

*Crossing track.*

In *WHALEN v. ST. LOUIS, KANSAS CITY & NORTHERN R'y Co.*, 60 Mo. 323 (1875), person crossing track run over by train; judgment for plaintiff for \$8,000 affirmed.

*Intoxicated person on track — Contributory negligence.*

MAHER *v.* ATLANTIC & PACIFIC R. R. Co., 64 Mo. 267 (1876), intoxicated person walking along track, struck and killed by train; judgment for plaintiff for \$5,000 reversed for contributory negligence of deceased.

*Crossing between opening of cars.*

DAHLSTROM *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'y Co., 96 Mo. 99 (1888), crossing railroad track between opening of cars standing at crossing; trespasser; judgment for plaintiff reversed for erroneous instructions.

*Crossing track at place other than crossing.*

BARKER *v.* HANNIBAL & ST. JOSEPH R. R. Co., 98 Mo. 50 (1888), person crossing track at place other than crossing, struck and killed by train; trespasser; failure to look and listen; judgment for plaintiff reversed.

## EDENS *v.* HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

*Supreme Court, Missouri, October Term, 1880.*

[Reported in 72 Mo. 212.]

### PERSON RUN OVER ON TRACK — DEFECTIVE TRACK — PLEADING.

— Where a petition, in an action against a railroad company for personal injuries, alleged that defendant was guilty of negligence in running its cars which collided with plaintiff and ran over him, and the trial court submitted the question of defendant's negligence in having defective sand box on its engine and in keeping a defective frog in its track, it was error to submit issues not raised by the pleadings, and the real ground of complaint should have been stated in the petition (1).

APPEAL from Jackson Circuit Court. *Judgment for plaintiff reversed.*

"After the jury had been out for several hours they came into

1. In WALDHIER *v.* HANNIBAL & ST. JOSEPH R. R. Co., 71 Mo. 514 (1880), an action by employee who was run over in defendant's yards, judgment for plaintiff was reversed, where the negligence charged was defective machinery and running of cars, and the proof showed that broken frog was cause of injury.

In BUFFINGTON *v.* ATLANTIC & PACIFIC R. R. Co., 64 Mo. 246 (1876), brakeman injured coupling cars, it was held that where the action was grounded on defective construction of engine, recovery could not be had where defective track was cause of injury, and judgment for plaintiff was reversed.



court and announced that they were unable to agree. The judge then spoke to them of the time that had been consumed in the trial of the case, and discharged them until next morning, telling them, 'Gentlemen, come back to-morrow morning with a determination to compromise.' When they came into the box next morning, the court again spoke to them of the great importance to the parties and to the county, that they agree upon a verdict, telling them orally, 'that many things juries were authorized to compromise, such as amounts; that very seldom twelve men went into the jury room with the same notions as to amounts, and compromises were necessary,' and directed them to retire and make a verdict. To this action of the court the defendant 'excepted.'

GEORGE W. EASLEY, for appellant.

BELCH & SILVER, for respondent.

**Hough, J.** — The material portion of the petition in this case is as follows:

"That on or about the 9th day of February, 1873, in the City of Kansas, Jackson county, Missouri, the defendant, not regarding its duty, and by reason of its negligence and carelessness, plaintiff was run against by one of defendant's cars, thereby throwing plaintiff upon the rail of the defendant, the said car of defendant then and there ran upon and over plaintiff. That plaintiff was then and there, by reason of the carelessness and negligence of defendant as aforesaid, broken and mutilated as to his right leg, to such an extent as to require its immediate amputation in order to save the life of the plaintiff, thereby permanently disabling him, in all which he has sustained great loss and damage, as well in the permanent mutilation of his body as aforesaid rendering him unable to work, and also in the great expense to which he has been subjected, and the great pain which he has suffered and still suffers, by reason of said negligence and carelessness of defendant."

The natural and legal significance of the foregoing petition is that the defendant was guilty of negligence in running the car or cars which collided with plaintiff and ran over him. The court submitted to the jury the question of defendant's negligence in having a defective sand-box on the engine, and in keeping a defective frog in its track. If the real ground of complaint was that the machinery or track was defective, it should have been distinctly stated in the petition. The plaintiff was not entitled

to recover upon a cause of action not stated in his petition, and the court erred, therefore, in submitting to the jury issues which were not raised by the pleadings. *Waldheir v. Hann. & St. J. R. R. Co.*, 71 Mo. 514; *Buffington v. A. & P. R. R. Co.*, 64 Mo. 246 (1).

That the motive which prompted the circuit judge to urge the jury to agree upon a verdict was a commendable one, we do not doubt, but we cannot approve the language in which his desire was communicated to them. It was manifestly prejudicial to the defendant.

The judgment will be reversed and the cause remanded. All concur.

**PEDESTRIAN STRUCK BY BACKING FREIGHT TRAIN AT CROSSING — FAILURE TO SIGNAL — INSTRUCTIONS — RAILROAD COMPANY LIABLE.** — In *EASLEY v. MISSOURI PACIFIC RAILWAY COMPANY* (*Supreme Court, Missouri, Division No. 1, December 1892*), 113 Mo. 236, an appeal from judgment rendered in the Jackson Circuit Court for plaintiff for \$4,000, in action for damages for being run over by defendant's train, whereby plaintiff lost a leg, judgment was affirmed, the court (per BARCLAY, J.) stating the case as follows:

"Plaintiff's injury occurred about seven or eight o'clock p. m., November 22, 1888, at the crossing of Broadway and defendant's railway in Kansas City, Missouri. The local ordinances forbade the moving of any locomotive, car, etc., within the city at a greater speed than six miles an hour, and also required all moving cars, etc., between sunset and sunrise, to have at least one lamp, headlight or lantern conspicuously placed in front thereof, facing in the direction in which the same might be moving. The crossing in question passes over defendant's tracks at a right angle. The general direction of defendant's line at that point is east and west. A small watch-house, for the use of a flagman, stands a few feet north of the tracks and west of the general line of travel on the roadway. The flagman stationed there is in the employ of the defendant. The passageway over the tracks is of plank and wide enough for one wagon. The plaintiff came upon the crossing going south, and noticed a train approaching from the west on the track farthest from him. He 'flashed his eyes up and down the track before he made the start,' to quote his own language; and then advanced, intending to await the passage of the train mentioned, when, just as

1. See abstracts of these cases, p. 205, *ante*.

he stepped upon the first (or northern) track, he was hit by a backing freight car moving westward at a speed of fifteen miles an hour, without a light or any signal of its approach. The night was dark and there were no lights about the crossing.

"There was a conflict of evidence as to the precise spot where plaintiff received his injuries. Defendant's witnesses located it from fourteen to forty feet west of the crossing; but plaintiff's statement that it was upon the crossing was corroborated by the police officer who found him lying on the ground, and noticed the blood on the rail where the plaintiff was hit. In this connection the court instructed that, if the jury believed that plaintiff was struck at a point west of the west line of Broadway, he was not entitled to recover, and they should find a verdict for the defendant. So the result must be regarded as a finding that plaintiff's injury took place at the crossing.

"Several errors are charged to the trial court, which will be considered.

"I. Defendant complains of the admission of evidence that there was no light at the crossing when plaintiff was injured. Plaintiff's case, it is true, does not proceed on the theory of defendant's negligence in not illuminating the crossing. No such allegation appears. But the evidence referred to was relevant nevertheless, as part of the *res gestæ*, and as having a direct bearing on the issue of plaintiff's alleged contributory negligence.

"It is the duty of a person who comes upon the track of a railway to use ordinary care to observe the movement of trains thereon. Such care greatly depends on the circumstances of each case. Had plaintiff, for example, enjoyed a full view of his surroundings at the time of his accident, which a good light would have afforded, and had then failed to notice the train that struck him, undoubtedly his legal standing before us would be far more precarious than it is upon the showing that has been made.

"The court gave defendant the full benefit of this distinction by instructing that no law or ordinance required defendant to light Broadway at that point or to keep a watchman there, and that the absence of either light or watchman was not negligence on defendant's part.

"II. Defendant next objects to a question, 'Did any of the trainmen come back to you there?' (referring to the plaintiff, just after he was run over); to which he answered, 'No.' But as defendant's train employees afterwards testified that they did come back to him, and his location then, with reference to the crossing, had a material bearing on the merits of the case, his testimony in contradiction of

the employees was certainly relevant in rebuttal. Its admission out of order could not justly be regarded as prejudicial to defendant's substantial rights upon the merits. Revised Statutes, 1889, §§ 2100 and 2303.

" III. There was no error in permitting plaintiff to prove how the crossing had been used during ten or twelve years before the accident.

" The trial opened with a sharp issue of fact as to whether or not the crossing was of a kind to demand its recognition as a public one, in respect to the giving of a warning signal by bell or whistle. On this subject plaintiff's evidence tended to show the establishment there of a public crossing by long user. Before the case closed, moreover, some of defendant's own witnesses corroborated plaintiff's contention on that point.

" Those facts were certainly admissible, too plainly so to require further comment.

" IV. Complaint is then made of one of the instructions in respect to its reference to plaintiff's conduct. After requiring a finding of negligence on defendant's part, in omitting to signal for the crossing, it proceeds thus: ' And if plaintiff was injured in consequence of such negligence and not from any fault of his own directly contributing to produce such injury,' then the verdict should be for the plaintiff.

" The criticism on this instruction is that it does not properly submit for decision the question of plaintiff's contributory negligence. But in that connection the court gave another instruction as follows:

" ' Even though the jury should believe from the evidence that the plaintiff was not free from fault, it is not sufficient to defeat him in this case on that ground unless he failed on that occasion to exercise such care as ought to be expected of an ordinarily prudent person under similar circumstances, and further, that such want of care directly contributed to produce such injury.'

" No objection is urged in this court to the instruction last quoted. We think it obviates any supposed obscurity there may be in that first mentioned.

" We do not wish, however, to be understood as ruling that the one criticised would be erroneous, standing by itself, but merely that it is very plainly not so, when accompanied by such an explanation of its meaning as the other instruction gives.

" Instructions should be read and construed together, and so construing these we consider that there is nothing of substance in defendant's objection to the first above noted.

" V. Defendant next complains of the modification of one of its instructions.

"The court added to it the words indicated below by italics, and gave it as thus modified, viz.:

" 'If the jury believe from the evidence that the plaintiff, *by the exercise of ordinary care*, could have seen or heard the train approaching, had he looked or listened, in time to have avoided being injured, and that he failed to do so, then such failure on his part was such negligence as would prevent a recovery, and your verdict should be for defendant.'

"What has been said in the first paragraph of this opinion need not be repeated in answer to this objection.

"The plaintiff was bound to exercise ordinary care to avoid injury. If the request, as originally asked of the court, meant to impose on him a higher degree of personal duty than that, it was erroneous.

"Failure to 'look and listen' may sometimes amount to a want of ordinary care. In some circumstances, it may be so pronounced by the court, if the case is sufficiently plain; but the standard by which such action or non-action is to be measured is that degree of care which, in the opinion of the court, should characterize a person of ordinary prudence in the same situation.

"That care obviously varies with the circumstances, and is generally to be ascertained by the aid of that common experience which the triers of fact bring to bear upon it. In the case at bar the court was right in leaving it to the jury to say whether plaintiff's conduct was or was not consistent with ordinary prudence.

"These observations will also apply to sustain the correctness of the ruling of the trial judge in refusing the following instruction which defendant asked, and on the refusal of which an error is here assigned, viz.:

" '4. The court instructs the jury that "if they shall believe from the evidence said street was not lighted at said point, and that no watchmen was stationed there, those facts alone and of themselves would place a higher degree of care upon a person about to cross defendant's railroad at such point, and, if the plaintiff attempted to cross said tracks at said point without carefully looking and listening for the approach of trains, when to have done so he could have seen or heard the train approaching in time to have avoided the danger, then plaintiff is not entitled to recover, and your verdict must be for the defendant.'

"VI. The most substantial objection urged here to the final action of the trial court relates to the conduct of the jury.

"It appears that while counsel for defendant was addressing the twelve after all the evidence was in and the instructions had been

given, one of the jurors interrupted him by stating that he (the juror) had been down to the point in question at noon that day (being the day after the trial commenced), and had seen for himself the watch-house in question and its location. The record adds that counsel continued speaking and 'during his argument to the jury he made no objection then nor afterwards to the further consideration of this case by the jury; and the case being thereafter finally submitted to the jury, the jury found the following verdict,' etc.

"The objection to the action of the juror appears to have been made in the trial court for the first time in the motion for new trial. We are of the opinion that it was then too late.

"It was, no doubt, highly improper for the juror to make of his own motion a personal examination of the premises mentioned in evidence but such action may have sprung from a mistaken enthusiasm in the interests of justice as he understood it, without any purpose to violate the proprieties or the rules of law. It did not, of itself, indicate a bias or prejudice for or against either party, and may have been entirely innocent in its intent. His frank acknowledgment of the act appears to indicate that such was, in fact, its character. As soon as defendant became aware of the misconduct, it should have objected thereto if it proposed ever to do so. It could not justly be allowed, after full knowledge of the irregularity, to lie by and take the chances of a favorable result; and then, upon being disappointed in that regard, go back and interpose the unspoken exception. This exact point was expressly so decided in *Stampofski v. Steffens*, 79 Ill. 303 (1875); and rulings involving the same principle have been made heretofore by this court. *Cochran v. Bartle*, 91 Mo. 636 (1887); *Grove v. Kansas City*, 75 Mo. 672 (1882).

"VII. It was further sought by defendant to be proved that another juror had visited the spot in question during a recess in the trial. But the only testimony to that point consisted of affidavits to the effect that that juror had afterwards stated or admitted that fact to bystanders.

"Jurors are not permitted to impeach their verdicts by their own affidavits of misconduct (*Pratte v. Coffman*, 33 Mo. 71 (1862), and still less by verbal admissions thereof to third parties. *State v. Rush*, 95 Mo. 199 (1888).

"The testimony in the affidavit on this subject was simply hearsay; and, of course, incompetent.

"VIII. These remarks dispose of all the objections assigned in this court to the conclusions reached on the circuit.

"But the plaintiff insists that the appeal is so devoid of merit as

to call for an award of ten per cent. damages. Revised Statutes, 1889, § 2305. We do not agree to that proposition. There certainly is enough in the case to justify asking a review of it by this court, as the above discussion of the points raised we think sufficiently shows. The judgment is affirmed." ELIJAH ROBINSON appeared for appellant; BOLAND & O'GRADY and GEORGE M. ELLIOTT, for respondent.

*Collisions at crossings — Persons crossing track.*

In addition to the Missouri cases reported herein, see the following COLLISION AND CROSSING cases:

Karle v. K. C., St. J. & C. B. R. R. Co., 55 Mo. 476; Nelson v. S. & P. R. R. Co., 68 Mo. 593; Cagney v. R. R. Co., 69 Mo. 416; Kennayde v. Pacific R. R. Co., 45 Mo. 255; Buits v. St. Louis, I. M. v. So. R'y Co., 98 Mo. 272; Jennings v. St. Louis, I. M. v. So. R'y Co., 99 Mo. 394; Brown v. Hannibal & St. Joseph R. R. Co., 99 Mo. 310; Kenney v. Hannibal & St. Joseph R. R. Co., 105 Mo. 272; Le May v. Mo. Pac. R'y Co., 105 Mo. 361; Rine v. R. R. Co., 88 Mo. 392; Boyd v. Wabash Western R'y Co., 105 Mo. 371; Lynch v. St. Joseph & Iowa R. R. Co., 111 Mo. 601; Gurley v. Mo. Pac. R'y Co., 122 Mo. 141 (see also same case, 93 Mo. 445, and 104 Mo. 211); Baker v. Kansas City, Fort Scott & Memphis R. R. Co., 122 Mo. 533; Neier v. Mo. Pac. R'y Co., 12 Mo. App. 35; Duffy v. Mo. Pac. R'y Co., 19 Mo. App. 380; Backenstoe v. Wabash, St. Louis & Pacific R'y Co., 23 Mo. App. 148; Kuttner v. Lindell Street R'y Co., 29 Mo. App. 502; Bindbeutel v. Street R'y Co., 43 Mo. App. 463; Smith v. Citizens' R'y Co., 52 Mo. App. 36; CLARK v. CHICAGO & ALTON R. R. Co. 127 Mo. 197 (1894), collision between trains at crossing; passenger injured; judgment for plaintiff for \$7,500 affirmed.

## DAVIES v. PEOPLE'S RAILWAY COMPANY.

*Court of Appeals, St. Louis, Missouri, December, 1896.*

[Reported in 67 Mo. App. 598.]

### STRUCK BY STREET CAR WHILE UNLOADING WAGON NEAR TRACK.

— In an action to recover damages for injuries sustained by plaintiff who, while unloading building materials from a wagon standing near street-car track, was struck by defendant's street car, it was held that as he occupied an obviously dangerous position, it was not unreasonable for plaintiff to count on due care and attention on part of defendant's servants to avoid injuring him (1).

1. In DAVIES v. PEOPLE'S R'y Co., of contributory negligence. It was 159 Mo. 1 (1900), the court held that, also held that the doctrine of comparative negligence has no recognition on the facts shown in the case in the St. Louis Court of Appeals, it was in the Supreme Court of Missouri. error to submit case to jury, as on Judgment for plaintiff in trial court plaintiff's own showing he was guilty reversed.

**CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS.** — An instruction that even though the jury might believe plaintiff negligently and carelessly exposed himself to danger, still if persons in charge of defendant's car could by the exercise of ordinary care have avoided the injury to plaintiff and failed to do so, then the finding should be for plaintiff, was properly given (1).

**APPEAL** from the St. Louis City Circuit Court. The facts appear in the opinion.

Certified to Supreme Court for final determination. No briefs filed.

**Biggs, J.** — The defendant owns and operates a double-track cable street railway on Fourth street in the city of St. Louis. The plaintiff, at the times hereinafter referred to, was employed about the work on a building which was being erected on the west side of Fourth street, just north of Valentine street. Under permission from the city authorities the contractors had deposited on the street in front of the building large quantities of building materials, leaving just enough space between the east track of defendant's road and the materials for the unloading of wagons. This had been the condition of the street for several months prior to the third day of April, 1895. On that day the plaintiff was engaged (at the point indicated) in unloading from a wagon a lot of heavy iron beams, and while doing so he was struck by a car on defendant's road, receiving serious personal injuries, for which he sues in this action.

The averment of negligence in the petition is that "he (plaintiff) was struck by said car wholly and entirely through the fault, carelessness, and gross negligence of the agents, servants, and

1. In *MAXEY v. MISSOURI PACIFIC R'Y CO.*, 113 Mo. 1 (1892), it was held (as per syllabus to the report), that "one who approaches a railroad track and without looking or listening or giving any attention to his surroundings steps thereon, and is almost immediately struck by a passing train, is guilty of such negligence as to prevent his recovery for the injuries so received, though the train was an extra one and no signal was given of its approach." Judgment for plaintiff was reversed.

See also *BOYD v. R. R. Co.*, 105 Mo. 371; *YANCEY v. R. R. Co.*, 93 Mo. 433; *TAYLOR v. R. R. Co.*, 86 Mo. 457; *POWELL v. R. R. Co.*, 76 Mo. 80; *TURNER v. R. R. Co.*, 74 Mo. 602; *HENZE v. R. R. Co.*, 71 Mo. 636; *ZIMMERMAN v. R. R. Co.*, 71 Mo. 476, cases in which recovery has been denied on ground of plaintiff's contributory negligence. See also *VOGG v. MISSOURI PACIFIC R'Y CO.*, 138 Mo. 172 (1897), a crossing-accident case, in its contributory negligence features strongly resembling to the *MAXEY* case, *supra*, where judgment for plaintiff was reversed and judgment ordered to be entered for defendant.



employees of defendant who were operating the same, who failed to check the speed of said car or to ring the bell, or to in any manner warn plaintiff of the approach of said car, although he was standing with his back to it, and in plain view of the persons engaged in its operation."

The answer contained a general denial, and also a plea of contributory negligence.

The plaintiff's evidence tended to prove these facts in addition to those already stated. The plaintiff's duty was to superintend and assist in removing materials from the wagons. At the time he received the injuries he was assisting in unloading some heavy iron beams from a wagon. The wagon was east of the railroad track a sufficient distance to allow cars to pass, its rear end being to the south. The cars on the east track ran north. The iron beams were being removed from the wagon by means of ropes, which were attached to a derrick. In adjusting the ropes the plaintiff by use of a lever prized up the ends of the beams at the rear end of the wagon, and in order to do this he was compelled to stand in the rear and slightly to the west of the west hind wheel of the wagon, thus exposing himself to the danger of being struck by a passing car. At the time of the accident the plaintiff was standing with his back to the approaching car, and was prying up the end of a beam while his assistants were fastening the hoisting apparatus around it. He did not see or hear the car, and the parties in charge of it failed to check its speed or to ring a bell, or give any warning whatever of its approach. For some distance south of the point where the plaintiff was at work, there was a full and unobstructed view of defendant's track. The plaintiff admitted on cross-examination that there was barely enough space between the track and the wagon to allow a man to stand sidewise along the side of the wagon and escape injury from a passing car, and that while he was unloading this particular wagon two other cars had passed, and being warned of their approach, he merely had to step aside or turn half way around to escape injury. He also admitted that he had been employed for some time at the work; that cars were continually passing, and that he was aware of the danger. He also admitted that the position assumed by him was the most dangerous one, but he asserted that the work could not have been done in any other way.

The defendant's evidence was to the effect that in approaching

the place of the accident the bell on the car was rung and the speed of the car slackened; then when the motorman first saw the plaintiff he was standing behind the wagon somewhere near its centre; that he was then in no apparent danger, and that when the car was a few feet from him he suddenly stepped in front of it; that when he did so the gripman applied the brakes, and did everything he could to stop the car and avoid the accident.

At the close of plaintiff's evidence, and also at the close of all the evidence, the defendant asked an instruction of nonsuit, which was refused. This constitutes the first assignment of error.

It is claimed that the instruction of nonsuit ought to have been given for the reasons: First, that there was no substantial evidence of the alleged negligence, and, secondly, that the evidence showed conclusively that the plaintiff failed to exercise reasonable and proper care for his own safety.

The first contention is clearly without merit. The plaintiff's evidence tended to prove that in the performance of his work he had to take a position so near to the track of the defendant road that his body extended over the track, and that in approaching the place where the plaintiff was at work the gripman failed to slacken the speed of the car, or to ring the bell, or give any warning of its approach, and one of the plaintiff's witnesses testified that when within a short distance of the place of the accident he (the gripman) was not looking ahead, as it was his duty to do, but seemed to be examining the machinery in the bottom of the grip car.

The question of the plaintiff's alleged contributory negligence was for the jury, unless no other inference could fairly or reasonably be drawn from the evidence than that plaintiff, in the circumstances, failed to exercise ordinary care for his own safety. *Corcoran v. Railroad Co.*, 105 Mo. 399. Or, stating the rule in another way, the question is one of fact for the jury where the evidence is such as may lead the minds of fair or sensible men to different conclusions. *Church v. Railroad Co.*, 119 Mo. 203. In the case at bar there is a dispute as to the attendant facts, but in disposing of this assignment we must look alone to the plaintiff's evidence. This evidence was to the effect that plaintiff, in unloading the beams, took the only possible position for the safe performance of the task assigned to him; that just at the time the car approached he was holding up the end of a heavy iron

beam, and in doing so he necessarily had to stand with his back to the approaching car. Under such circumstances is the inference an unavoidable one, that in standing with his back to the south, and in failing to keep a constant watch for an approaching car, he failed to exercise ordinary care for his own protection? We think not. It is true that he could have seen the car if he had turned his head, and that if he had been aware of the danger he could have escaped injury by taking one step to the east, but it must be borne in mind that at the critical moment he was sustaining a heavy weight, which required all of his exertion and attention, and as he occupied an obviously dangerous position, it was not unreasonable for him to count on due care and attention on the part of the defendant's servants to avoid doing him an injury; that is, by noticing his position, and by stopping the car until the hoisting apparatus could be adjusted on the beam, or at least by giving him some warning of the pending danger. The cases relied on by appellant are not and cannot in the nature of things be controlling. What is negligence and what is diligence, must be determined by the facts and circumstances of each individual case. No definite standard can be erected or rule evolved by which every case can be measured or determined.

In the plaintiff's third instruction the jury were told in substance that even though they might believe that the plaintiff negligently and carelessly exposed himself to danger, still if the persons in charge of the car saw, or by the exercise of ordinary attention could have seen his danger in time to have avoided the accident by the use of ordinary measures of precaution, and they failed to do so, then the finding should be for the plaintiff. This instruction declares a familiar principle that is applied daily in the courts. In the operation of an electric or cable railway in the streets of a populous city, the persons in charge of its cars should keep a strict watch along the entire route, and when a person is seen on the track or near the track and is in apparent danger, it is their duty to sound the bell and use all reasonable methods to prevent the injury, and it is no less their duty if such person has recklessly exposed himself to danger. The plaintiff's evidence warranted the instruction, for it tended to show that the railroad track at the place of the accident could be seen for some distance south; that the plaintiff was standing with his back to the approaching car, and was either on the track or so close to it that the car could not pass without striking him, and that

the danger of his position could have been discovered by the gripman in time to have avoided the accident. We, therefore, conclude that there was no error in giving the instruction.

What we have said answers the objections made by defendant to the action of the court as to other instructions. We think that the case was fairly tried, and the judgment ought to be affirmed. But, as one of the judges is of the opinion that our decision is opposed to the decisions in the cases of *Vogg v. Railroad Co.*, 138 Mo. 172, and *Maxey v. Railroad Co.*, 113 Mo. 1, the cause will be certified to the Supreme Court for final determination. All the judges concur.

## FIEDLER v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

*Supreme Court, Missouri, Division No. 2, October Term, 1891.*

[Reported in 107 Mo. 645.]

**CHILD KILLED BY TRAIN WHILE WALKING ON TRACK — RAILROAD LIABLE.** — In an action to recover damages for the death of plaintiff's daughter fifteen years old, caused by being run over by defendant's train, it appeared that while the girl was a trespasser on the track yet a great many people were in the habit of walking along the tracks; that the train was running at a speed greater than permitted by a city ordinance; that the engineer saw the girl when about 600 feet distant and signaled her, but did not check speed of train. *Held*, that the verdict for plaintiff was justified by the evidence.

**APPEAL** by defendant from judgment for plaintiff in St. Louis City Circuit Court. The facts appear in the opinion. *Judgment affirmed.*

H. S. PRIEST, for appellant.

JOSEPH JECKO and RASSIEUR & SCHNURMACHER, for respondent.

**Gantt, P. J.** — This action was brought by the respondent against the Missouri Pacific Railway and the St. Louis, Iron Mountain and Southern Railway Company, to recover the statutory penalty for \$5,000 for causing the death of his minor daughter, Katherina Margaret, by negligently running a train of cars over her on the 15th day of September, 1887. Plaintiff dismissed as to the Missouri Pacific Railway before the trial.

Plaintiff averred that on the 15th of September, 1887, while

his said daughter was walking along Main street in said city at a point a short distance below Anna street, the defendant, with gross negligence and carelessness, caused one of their trains with locomotive attached to be propelled along and across said Main street in such a manner that with speed it approached along and across said Main street and struck and killed said Margaret Fiedler, without any negligence on her part contributing to said injury; that defendant's employees failed to keep such a lookout as careful management would dictate; that no bell was rung, and no signal or warning was given of the approach of said train; that defendant was running the said train at a rate of speed exceeding six miles an hour, with no bell ringing, in violation of an ordinance of the city of St. Louis; that but for the carelessness in running said train defendant might have prevented the injury to deceased after they saw the danger to which she was exposed. The answer was a general denial and contributory negligence.

Plaintiff was a peddler, who at the time of the death of his daughter was living at Utah street and levee, near the scene of the accident. His daughter Margaret was about fifteen years old, of ordinary size for girls of that age. She was on her way to work in a match factory near Benton street, north of her home. It does not appear how long she had worked in the factory prior to her death.

The accident occurred about 6:45 A. M. on the main east track of defendant's road, from 150 to 250 feet south of the crossing of Anna street, and between that street and the Arsenal wall. Anna street runs east and west at right angles with and across the tracks. Other streets abut upon the tracks, but none of them cross. The tracks are upon an embankment eight to ten feet high, running north and south, and are straight, presenting an open view between Anna street and the Arsenal, and beyond a distance approximating 2,000 feet. There are two tracks; the east track is used by north-bound trains, and the west by south-bound trains. There is a space of six feet between the tracks.

The train which struck plaintiff's daughter was the regular north-bound passenger from the south to St. Louis. It was on time. The accident was witnessed by several witnesses. The plaintiff called four, Gordon, Durand, Wycoff, and Cartner. The first three were standing upon the station platform at Anna street, waiting to take the south-bound train, then about due, for their work.

Gordon testified he had just bought a ticket of the agent, and, as he came out of the door, heard the alarm whistles blown by the engine, looked and saw the plaintiff's daughter about ten feet in front of the train on the east track; saw it strike her, at a point about 350 feet south of Anna street. The train brought the body on the pilot to the depot, where it dropped off; she was unconscious. He noticed when the train reached the depot, "the brakes were applied to the drivers and the wheels of the cars were dragging." He thought the train was running from twelve to fifteen miles an hour. Durand gave it as his opinion that the train was about twenty yards from the girl when the alarm whistle was blown. She did not heed the alarms *at all*, but kept walking up the track in front of the train. This witness says she was on the east track all the time. The plaintiff, over the objection of the defendant, proved by this witness that there was no other handy way to go down south except on the railroad tracks, unless a person should go round by Third street.

Edwin C. Wycoff testified he was at the station that morning; when he first saw the train it was coming out of the Arsenal wall; the girl was then going north, on the west track, the train on east track. She left the west track, he supposed, because the south-bound train would soon be due. At a point about four hundred feet south of the station at Anna street the girl shifted her position from the west to the east track. She could have been seen on the track from the Arsenal wall as the view was clear. *The engineer sounded the whistle when about three hundred feet from the girl.* Does not recollect that she walked between the tracks. She paid no attention whatever to the whistle.

Cartner testified that he was walking north twenty-five or thirty feet behind the girl. She was on the east track. He heard the train coming, heard it whistle within half a block or one hundred and fifty feet of the girl. Heard no bell. He saw the girl when the engine whistled; she did not pay any attention to it.

The defendant demurred to the evidence. The court overruled the demurrer, and defendant then offered evidence that its fireman rang the bell continuously; that the girl was on the west track, left it and passed in front of the train and walked up the east track; that the engineer at once gave the signals, and attempted to stop the train, but it was too late.

The important question of fact in the case was whether the deceased was walking on the east track on which the train was

moving north that morning in full view of the engineer, and on this point the evidence is conflicting. The jury were the triers of fact, and they found she was on the track, continuously from near the Arsenal till she was struck.

If the jury believed plaintiff's witnesses, as it was their province to do, the girl was on the same track with the train, at a point at least six hundred feet in front of it; the view was unobstructed. Indeed the engineer says himself that he saw her when he was at a point a little north of Dorcas street, *about six hundred feet ahead of him*, but he thought she was between the tracks. He admits he was running about ten miles an hour. He says he gave the danger whistle when he was within thirty-five feet of the girl. He saw the girl all the time. The jury must have concluded that the engineer was mistaken as to the girl's being between the tracks.

That the girl was a trespasser by the statute law of the State is clear, but the evidence of the conductor and fireman of the train is undisputed that, at the hour this train passed this point, a great many people were in the habit of walking on and across these tracks. It was a place where the trainmen might expect to find pedestrians on the track.

The conduct of the deceased is inexplicable. Signals that were heard by all the other witnesses were unheeded by her, although given in thirty-five feet of her. There is but one explanation of her conduct, and that is she must have concluded that the train was approaching from behind on the west track; either this or she was lost in abstraction, and totally oblivious of her surroundings. That she had put herself in a place of peril must be conceded; the habit of adult people deliberately walking on these tracks is inexcusable and reprehensible in the highest degree. It is their duty to refrain from committing a trespass. The statute prohibiting all persons from walking on these tracks was enacted with the double view to save the lives of the trespassers by warning them of danger and of preventing accidents and lessening the danger to the passengers and trainmen whose safety depends upon a clear and unobstructed track.

In the construction of that statute in *Barker v. Railroad*, 98 Mo. 50, this court held that trainmen were under no obligation to be on the watch for a trespasser at a place where there was nothing in the surroundings that would naturally lead them to suspect that persons would be on the track. But because of the

known propensity of children and even adults to take the chances of walking on those tracks in populous cities or districts, the rule has been long settled in this State, that when there is reason to apprehend that the track may not be clear, notwithstanding the right of the company to have it clear, the persons operating a train cannot act on the presumption that the track is clear without being responsible for the consequences.

In *Dunkman v. Railroad Co.*, 95 Mo. 232, after a review of all the cases in this State, this court held, that "notwithstanding the injured party may have been guilty of contributory negligence a railroad company is still liable for the injury if it could have been prevented by the exercise of reasonable care on the part of the company *after discovering of the danger in which the injured party stood*, or if any of the company failed to discover the danger through its own recklessness, when the exercise of ordinary care would have discovered it, and averted the calamity," and the same doctrine is repeated, and re-affirmed in *Williams v. Railroad*, 96 Mo. 275. Here the girl was seen by the engineer six hundred feet ahead of him. If she was on the track on which he was running his train, and he saw her six hundred feet ahead of him and gave the alarm, or as some of the other witnesses say in three hundred feet of her, and she gave no heed whatever to this signal of danger, as a reasonably careful man, it then became his duty to check his train and avoid injuring her, after thus observing her danger. Her position had then become one of peril. The fact that she was walking between the rails and the whistle sounded so close to her in the rear, and she gave no indication whatever of hearing it, imposed on the engineer the duty of stopping his train and avoiding her destruction.

The jury were authorized by the evidence to find he saw her and could have stopped. If she was really walking between the tracks, he might reasonably expect she would not only not get on his track but would withdraw to a place of safety.

The court fairly submitted to the jury defendant's theory of the case, in instruction numbered 1, given of its own motion. Had the jury found the facts upon which that instruction was based it was their duty to have returned a verdict for defendant. It is clear they chose rather to believe the other witnesses. They are the triers of the facts. We think the Circuit Court instructed them properly. It is very clear the train was being run far in excess of six miles an hour.



The wisdom of that ordinance would seem to be vindicated by the facts in this case. Had the train been running at the speed prescribed by the ordinance, this girl would have been discovered and her life preserved notwithstanding her imprudence and abstraction. We think the case was well tried. The judgment is affirmed. All concur.

BOY RUN OVER AT CROSSING — CONTRIBUTORY NEGLIGENCE FOR JURY — RAILROAD COMPANY LIABLE. — In *GASS (BY NEXT FRIEND) V. MISSOURI PACIFIC RAILWAY COMPANY* (*Court of Appeals, Kansas City, Missouri, April, 1894*), 57 Mo. App. 574, an appeal by defendant from judgment rendered for plaintiff in the Cooper Circuit Court, the judgment was affirmed. (H. S. PRIEST and WM. S. SHIRK, appeared for appellant; CARLISLE & OTTOFY and JOHN R. WALKER, for respondent). The opinion was rendered by ELLISON, J., as follows: "This action is for personal injuries received by plaintiff, a boy thirteen years of age. The accident happened at a crossing (to all intents and purposes a public crossing), in the city of St. Louis. The injury was inflicted by a train running backwards, one of the cars passing over plaintiff's legs as he was attempting to pass over the track at the crossing, — at least this was shown by plaintiff's case. Defendant asked and was refused an instruction at the close of plaintiff's case in the nature of a demurrer to the evidence. Defendant then introduced evidence in its own behalf which had the effect of waiving the demurrer and leaves the case to stand on the sufficiency of the whole evidence taken together.

"Our opinion is that the evidence is sufficient to sustain the verdict, as will appear in the further discussion of the case on the instruction submitted to the jury. Defendant's instructions were all given as asked, except by an amendment of two of them in which the hypothesis of plaintiffs having exercised such care and prudence as was to be expected from one of his age and capacity, was left for the determination of the jury in passing on the question of contributory negligence. Such question was also submitted in plaintiff's instructions. In this respect there was no error. The plaintiff was of that age when it was proper to submit to the jury as a question of fact whether his actions as shown in evidence amounted to contributory negligence. *Duffy v. Railroad Co.*, 19 Mo. App. 380; *Spillane v. Railroad Co.*, 111 Mo. 562, 564.

"There was shown in evidence an ordinance of the city of St. Louis, wherein it was provided that it should be unlawful for any one to move or run cars propelled by steam within the limits of the

city, without constantly sounding the bell; and that it should be unlawful to run freight cars backwards in said limits, without having a man stationed on the top of the car farthest from the engine to give danger signals. The evidence tended to show that neither of these provisions of the ordinance was complied with in this case; the result of which must be to hold the defendant guilty of negligence. *Backenstoe v. Railroad Co.*, 23 Mo. App. 148; *Eswin v. Railroad Co.*, 96 Mo. 290. The court in this connection properly submitted to the jury, by instructions 1 and 2 for plaintiff, whether the accident happened in consequence of this negligence.

"The court, by instruction No. 3 for plaintiff, directed the jury that although they should believe that plaintiff was guilty of having placed himself in a dangerous position and was negligent in failing to observe the approaching train, yet if defendant's servants operating said train saw plaintiff was in a dangerous situation, or, by the exercise of reasonable care on their part, might have discovered his dangerous situation in time to have averted the injury by using ordinary diligence, then their verdict should be for the plaintiff. The objection made by defendant to this instruction is that it had no evidence whatever in its support. There was no evidence which in affirmative terms disclosed that any of defendant's servants saw plaintiff before the accident, or that they, by diligence, might have seen him. But while this is true, there was yet abundant evidence in the cause from which the jury could reasonably presume or infer that they either saw him or might have seen him if they had been diligent. It was shown that the view was unobstructed from a point where plaintiff emerged from behind standing freight cars on an adjoining track, these cars standing back from the track on which the train was moving, about twenty feet, as stated in a portion of the testimony. If defendant's servants had been on the lookout, as they should have been, they would have seen plaintiff. If they were not on the lookout they were not diligent. But defendant's principal point of objection is that if its servants had or could have seen plaintiff, they did not and could not have seen him *in time* to have averted the accident. But there is evidence the tendency of which is to show the contrary. There is evidence tending to show that while plaintiff was walking the space of twenty feet the train could have been stopped. The evidence as to the distance in which it actually did stop shows this. Of course there is room for strong argument that defendant's servants could not know that plaintiff intended to cross the tracks, but this was a matter for the jury to consider in the light of all the evidence and surrounding circumstances, including the fact of plaintiff's youth.

But this is not all. The instruction does not say that the servants saw him, or might have seen him in time to stop the train, but in time to have averted the injury by ordinary diligence. Now, if one of defendant's servants had been on the top of the car at the end of the backing train, where the jury might well conclude he reasonably should have been, he could have seen plaintiff; and, it may be reasonably inferred, in time to have averted the injury by hallooing at him. The jury might very well conclude, apart from the ordinance, that the reasonable place for one of the servants to be on a backing train in a city and among numerous cars and tracks, was at the end thereof, where he could readily and quickly see the imminence of danger. The instruction does not confine itself to what the servants might have seen in the positions they actually were at the moment preceding the accident, but it embraces positions where, by the exercise of reasonable care on the part of the servants, they should have been.

"The greater part of defendant's attack upon the judgment is spent on the contention that there is no evidence in the record to show that the negligence of defendant was the immediate cause of the accident; in other words, that if the negligence charged and proven had not occurred and defendant's servants had rung the bell constantly and one of them had been stationed on top of the car farthest from the backing engine, still the accident would have happened. We are not of the opinion that the evidence shows this conclusively. That the jury have had the point put clearly before them is evidenced by the following instruction to defendant: '7. The court further instructs the jury that it devolves upon the plaintiff to prove to the satisfaction of the jury, by a preponderance of evidence, the following facts, viz.: First. That plaintiff was in the act of crossing defendant's track at the time he was injured. Second. That he was struck by a car which at the time was being run by the defendant over or upon its track. Third. That said car was being propelled backward over defendant's said track; and that the bell of the engine which propelled it was not being rung at the time, or that the car furthest from said engine did not have stationed upon it a man or watchman to give notice of danger to plaintiff. Fourth. That the absence of such man or watchman, or the failure to ring the bell, was the immediate cause of plaintiff being run over and injured, and unless the plaintiff has proven these facts to the satisfaction of the jury, by a preponderance of the evidence, you will find for the defendant.'

"Can we, under any rule governing appellate tribunals, say that if the bell had been constantly rung as required by the ordinance, it

might not reasonably have attracted plaintiff's attention and thereby prevented his going upon the track? As to that branch of the negligence in not having a man stationed on top of the end car, is it not highly probable that if a diligent and careful man had been in that position he could and would have warned plaintiff away. Defendant's first instruction puts this phase of the case too favorably for defendant by saying, inferentially and in effect, that such man must have been able, had he been in such position, to have signalled the engineer in time to have stopped the train. The question is properly submitted by defendant in the instruction which we have set out, wherein it is stated that plaintiff must prove that defendant did not have 'a man or watchman' stationed on the end of the car, *'to give notice of danger to plaintiff.'*

"There is much in the argument of counsel on the question of contributory negligence of plaintiff, and which is based on the testimony disclosing his movements just before the accident as well as his acts of omission in failing to observe the train which, if we were dealing in a case of an adult, would be given more weight than we attach to it here, from the fact that, as we have before stated, this plaintiff was of that age when the question as to his responsibility for imprudent acts should be submitted to a jury, which was done in this case. We see nothing to authorize our interference and hence affirm the judgment. All concur."

### CHILDREN INJURED ON RAILROAD TRACKS.

Among the Missouri cases relating to injuries to children and young persons caused by being run over by trains or street cars while crossing track, etc. (other than those reported with the Missouri cases in this volume of AM. NEG. CAS.), see the following:

#### *Child injured trying to get on cars — Railroad not liable.*

In *SNYDER v. HANNIBAL & ST. JOSEPH R. R. CO.*, 60 Mo. 413 (1875), it was held (as per syllabus to the official report), that "a railroad company will not be held liable for injuries received by a child while attempting to get upon one of its cars, in consequence of an invitation from one of its servants in charge of the car, where the evidence shows no authority on the part of the servant to permit persons to ride on the car, and it does not appear that the invitation or permission were in furtherance of the interests of the railroad, or connected in any manner with the service which the servant was employed to render."

*Child straying on track and run over by train.*

ISABEL *v.* HANNIBAL & ST. JOSEPH R. R. CO., 60 Mo. 475 (1875), child straying from parent and going upon railroad track, run over and killed by train; judgment for plaintiff affirmed.

*Boy sitting on trestle run over by train.*

OSTERTAG *v.* PACIFIC R. R. CO., 64 Mo. 421 (1877), boy sitting on trestle work under one of a train of freight cars, run over and killed by starting of train; judgment on verdict directed for defendant affirmed.

*Boy run over by train.*

BELL *v.* HANNIBAL & ST. JOSEPH R. R. CO., 72 Mo. 50 (1880), boy about sixteen years of age, run over and killed while on track; judgment for plaintiff reversed.

*Boy attempting to pass between cars at crossing.*

SCHMITZ *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'Y CO., 119 Mo. 256 (1883), boy nine years old injured by train while attempting to pass between cars of train standing at street crossing; judgment for plaintiff for \$5,708 affirmed.

BARKLEY *v.* MISSOURI PACIFIC R'Y CO., 96 Mo. 367 (1888), boy attempting to pass around freight train obstructing crossing run over by train; contributory negligence; judgment for plaintiff reversed.

*Kicking cars across track — Child run over.*

MERZ *v.* MISSOURI PACIFIC R'Y CO., 14 Mo. App. 459 (1883), child run over by locomotive which was kicking cars across track; arm amputated; action by father of child; judgment for plaintiff for \$1,703 affirmed.

Another action was brought by the child himself in the Merz case, and judgment for plaintiff was affirmed. (See 13 Mo. App. 589.)

*Child straying on track killed by engine.*

REILLY *v.* HANNIBAL & ST. JOSEPH R. R. CO., 94 Mo. 600 (1887), infant sixteen months old straying onto track, killed by switch engine; question of parents' negligence properly for jury; judgment for \$5,000 affirmed.

*Boy killed by flat car at crossing.*

WILLIAMS *v.* KANSAS CITY, SPRINGFIELD & MEMPHIS R. R. CO., 96 Mo. 275 (1888), boy twelve years old struck and killed by flat car at crossing opposite freight depot; question of contributory negligence for jury; judgment for plaintiff reversed for erroneous instruction

on knowledge of defendant of boy's danger where there was no evidence as to same.

*Boy on sled run over by freight train.*

ESWIN *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'y Co., 96 Mo. 290 (1888), boy about twelve years old run over and killed by freight train; boy going down hill on sled; speed of train greater than permitted by city ordinance; judgment for plaintiff reversed for erroneous instructions.

*Child run over by cable car.*

WINTERS *v.* KANSAS CITY CABLE R'y Co., 99 Mo. 509 (1889), child three years old run over by cable car; judgment for plaintiff affirmed.

*Run over by street car.*

FATH *v.* TOWER GROVE & LA FAYETTE R'y, 105 Mo. 537 (1891), boy about five years old run over by defendant's street car; judgment for plaintiff reversed.

*Boy struck by train at street crossing.*

DLAUHI *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'y Co., 105 Mo. 645 (1891), boy about fourteen years old crossing track at street crossing struck by train; judgment for plaintiff reversed for erroneous instructions.

*Boy struck by train.*

SPILLANE *v.* MISSOURI PACIFIC R'y Co., 111 Mo. 555 (1892), boy six years old struck by train; judgment for plaintiff reversed for erroneous instructions on contributory negligence.

See also POWELL *v.* MISSOURI PACIFIC R'y Co., 76 Mo. 80 (1882), boy on track at street crossing struck by train; contributory negligence; judgment for plaintiff reversed.

SWADLEY *v.* MISSOURI PACIFIC R'y Co., 118 Mo. 268 (1893), young man struck by cars thrown from track; judgment for plaintiff affirmed.

COLLISIONS WITH ANIMALS ON TRACK.

Among the numerous Missouri cases relating to the killing of live stock on railroad tracks, caused by collisions with trains, see the following:

Lloyd *v.* Pacific R. R. Co., 49 Mo. 199; Shelton *v.* St. Louis, Kansas City & Northern R'y Co., 60 Mo. 412; Cary *v.* St. Louis, Kansas City & Northern R'y Co., 60 Mo. 209; Gerren *v.* Hannibal & St. Joseph R. R. Co., 60 Mo. 405; Meyer *v.* Atlantic & Pacific R. R. Co., 64 Mo. 542; Robertson *v.* Atlantic & Pacific R. R. Co., 64 Mo. 412; Cousins *v.* Hannibal & St. Joseph R. R. Co., 66 Mo. 572; Harrington *v.* Chicago, Rock Island & Pacific R. R. Co., 71 Mo. 384; Speelman

*v. Mo. Pac. R'y Co.*, 71 Mo. 434; *Sullivan v. Hannibal & St. Joseph R. R. Co.*, 72 Mo. 195; *Wallace v. St. Louis, Iron Mountain & Southern R'y Co.*, 74 Mo. 594; *Wier v. R. R. Co.*, 48 Mo. 558; *Calvert v. R. R. Co.*, 34 Mo. 242; *Edwards v. R. R. Co.*, 66 Mo. 567; *Gorman v. R. R. Co.*, 26 Mo. 441; *Sloan v. Mo. Pac. R'y Co.*, 74 Mo. 47; *Morrow v. K. C., St. J. & C. B. R. R. Co.*, 74 Mo. 82; *Bates v. St. Louis, I. M. & So. R'y Co.*, 74 Mo. 60; *Revelle v. St. L., I. M. & So. R'y Co.*, 74 Mo. 438; *Williams v. Mo. Pac. R'y Co.*, 74 Mo. 453; *Jackson v. St. L., I. M. & So. R'y Co.*, 74 Mo. 526; *Young v. Hannibal & St. Joseph R. R. Co.*, 79 Mo. 336; *Nance v. St. Louis, I. M. & So. R'y Co.*, 79 Mo. 196; *Kendig v. Chicago, R. I. & P. R'y Co.*, 79 Mo. 207; *Wade v. Mo. Pac. R'y Co.*, 78 Mo. 362; *Rozzell v. R. R. Co.*, 79 Mo. 349; *Morris v. R. R. Co.*, 79 Mo. 367; *Blakeley v. R. R. Co.*, 79 Mo. 388; *Hudgens v. R. R. Co.*, 79 Mo. 418; *Asher v. R. R. Co.*, 79 Mo. 432; *Fitterling v. R. R. Co.*, 79 Mo. 504.

**PEDESTRIAN STRUCK BY STREET CAR WHILE CROSSING STREET.** — In *Wall v. Helena Street R'y Co.*, 12 Mont. 44 (1892), an action for damages for personal injuries sustained by being struck by a street car, judgment was rendered for plaintiff for \$2,500, which, on appeal, was affirmed. The following facts (as per opinion by BLAKE, CH. J.), appear to have been proved by a fair preponderance of testimony: "About three o'clock in the afternoon of January 23, 1890, a car drawn by two horses was being driven on defendant's track to the south of Main street in the city of Helena. The driver was a boy about fifteen and a half years old, who lacked the strength needful for this employment, and was working temporarily in the place of another. At this time the horses were trotting at the rate of seven miles per hour, which was a violation of an ordinance that prohibited such speed above the rate of six miles per hour. When the car approached the south crossing of Grand street, the plaintiff, a man thirty-one years old, attempted to go from the west to the east side of Main street. Some cabs were standing on each side of the crossing near the west sidewalk, and a vehicle was also going south in advance of and between the plaintiff and the car, and his view was thereby obstructed. The plaintiff passed safely between the cabs, and in front of the horses attached to the vehicle, and partially over the railroad track, when he was struck in the breast by the pole of the car, and knocked down and dragged or pushed a distance of thirty or forty feet. A competent driver could have stopped the car, under these circumstances, within fifteen feet of the point of collision, and within a less distance if the rate of speed had been under six miles per hour. The time during which these events occurred was less than a minute. The plaintiff received severe and dangerous injuries after he was knocked down. While he was held or pressed between the scraper and the wheel, the bystanders raised

the front end of the car to remove the plaintiff from his position, but were compelled by a movement of the horses to drop it before he was rescued." \* \* \* The following instruction was properly given (among others): "A man in attempting to cross a thoroughfare in a city is bound to exercise reasonable care and caution, so as to avoid injury; and, on the other hand, it is the duty of a street-car company so to conduct its business and run its cars as to avoid, as far as practicable, by the exercise of ordinary prudence and caution, doing injury to pedestrians." \* \* \* Judgment for plaintiff affirmed, but DE WITT, J., dissented in a separate opinion.

*Passenger injured in collision between street cars — Damages.*

HAMILTON *v.* GREAT FALLS STREET R'Y CO., 17 Mont. 334 (1895), collision between street cars; passenger injured; verdict for \$20,000; personal injuries, head, side, internal organs, nervous shock, etc.; reduction suggested to \$7,500; judgment affirmed on filing of remittitur; motion for rehearing denied.

*Animals injured on track.*

See the following Montana cases: BECKSTEAD *v.* MONTANA UNION R'Y CO., 19 Mont. 147; MCMASTER *v.* MONTANA UNION R'Y CO., 12 Mont. 163; MCCAULEY *v.* MONTANA CENTRAL R'Y CO., 11 Mont. 483; BIELENBERG *v.* MONTANA UNION R'Y CO., 8 Mont. 271; GRAVES *v.* NORTHERN PACIFIC R. R. CO., 5 Mont. 556.

## CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY *v.* WILGUS, ADM'R.

*Supreme Court, Nebraska, May, 1894.*

[Reported in 40 Neb. 660.]

**QUESTION FOR JURY.** — Questions of negligence and contributory negligence, where the facts are such that from them different minds may reasonably draw different conclusions, are for the jury and not for the court to determine.

**DUTY OF RAILROAD COMPANY TOWARDS PERSONS ON ITS RIGHT OF WAY** — A railroad company does not discharge its whole duty by refraining from wantonly injuring a trespasser upon its tracks after observing his position. It is bound in all cases to exercise reasonable care to avoid injuring all persons who are known to be, or who may be reasonably expected to be, upon its right of way (1).

(Syllabus by the Court.)

1. In CHICAGO, BURLINGTON & of same accident as the case at bar QUINCY R. R. CO. *v.* WYMORE, Adm'r, (Wilgus case), judgment for plaintiff 40 Neb. 645 (1894), action arising out was reversed for erroneous instruction



Error from the District Court, Custer County. The facts appear in the opinion. *Judgment affirmed.*

MARQUETTE & DEWEESE, J. A KILROY, J. S. KIRKPATRICK and A. W. AGEE, for plaintiff in error.

SULLIVAN & GUTTERSON, for defendant in error.

**Irvine, C.** — Minnie M. Wilgus was killed through a collision of two freight trains on the plaintiff in error's road at Mullen, and this action was brought by her father as administrator to recover damages on account of her death. The accident was the same which resulted in the death of John K. Wymore, and the opinion in the case of Chicago, B. & Q. R. R. Co. *v.* Wymore, 40 Neb. 645 (1), contains a full statement of the facts. The evidence in this case differed but slightly from that in the Wymore case. Upon the trial of this case one witness testified that the switch key in question had failed to open the lock of another switch the day before the accident. In this case the engineer and fireman of the east-bound train were upon the stand and testified that the east-bound train was running only at ten or twelve miles an hour when it entered the switch, contradicting the plaintiff's witness in this respect. There were no other material differences in the evidence in the two cases. What has been said in the opinion in Chicago, B. & Q. R. R. Co. *v.* Wymore, 40 Neb. 645, as to the law of negligence and contributory negligence is entirely applicable to this case and need not be repeated. The instructions here were, however, in strict accordance with the law as announced in the Wymore case. The assignments of error relating to the instructions, so far as they are presented in the briefs, refer only to the refusal to give the instructions asked by the railroad company. Of these the fourth and ninth are the only ones to which plaintiff in error especially directs attention. The fourth was as follows: "If

as to damages. On the questions of negligence it was held that "questions of negligence and contributory negligence, where the facts are such that from them different minds may reasonably draw different conclusions, are for the jury and not for the court to determine." As to duty of railroad companies to persons on right of way, it was held that "a railroad company does not discharge its whole duty by

refraining from wantonly injuring a trespasser upon its tracks after observing his position. It is bound in all cases to exercise reasonable care to avoid injuring all persons who are known to be, or who may be reasonably expected to be, upon its right of way."

1. See abstract of the WYMORE case, as note to headnote of case at bar.

you find that the said Minnie M. Wilgus, just prior to her death, desired to cross the tracks and depot grounds of the defendant company, in order to reach the defendant's depot, and that the public roadway was at that moment obstructed by a train standing on the side track, this fact would not justify her in going upon the private grounds of the company across and between the tracks and side tracks, and in front of and near the trains which were moving or were liable to move in order to reach the depot, that in such case it would be her duty to go upon the public crossing and wait a reasonable time until the crossing was made clear so that she might pass over in safety; and if you find that she did not do this, but chose to go between the tracks and among and near to the trains and engines moving, or standing ready to move, and by reason thereof was killed on account of a collision between the trains, then she would be guilty of such contributory negligence as to defeat the plaintiff's right to recover in this case." This instruction was objectionable for the same reason that the instruction given to the jury after retirement in the Wymore case, *supra*, was held erroneous. By that instruction the jury was absolutely told that crossing the tracks and passing around the train did not constitute contributory negligence. By the instruction we are considering the jury would have been told that doing so constituted contributory negligence. We repeat that, under the circumstances of this case, whether or not these persons were guilty of negligence in attempting to pass around the train was a question for the jury and not for the court.

The ninth instruction requested was as follows: "If you find from the evidence that the accident by which Minnie M. Wilgus lost her life was caused by a defect in the switch key furnished to one of the switchmen of the defendant, and of which the defendant and its employees had no actual notice; that said key had been used by such switchmen in one or more other switch locks of the same pattern, and worked properly in such other lock or locks, but would not work in the switch lock where the accident occurred by reason of some latent defect, that is, some defect which could not be detected by ordinary care and observation, then you are instructed that the defendant would not be liable for any damages caused by said defect in such key, and your verdict should be for the defendant. In determining whether or not such defect could have been discovered by ordinary care and

prudence you should consider all the evidence tending to show that said key worked properly or would not work in other switch locks of the same pattern." This instruction was objectionable for the same reason, — transforming a question of fact into one of law. It told the jury that as a matter of law the company had performed its duty in reference to the key, if the key had been found to work properly in one or more locks, and if its defect was not discoverable by ordinary observation. Whether the testing of a key which was expected to operate in all the locks of the road in only one of those locks was the exercise of proper care is by no means so clear as to justify a peremptory instruction. The safe operation of trains required that these keys should surely and promptly open any lock which the person carrying the key would have any occasion to use, and a test upon one lock where the consequences of a defect are so serious would certainly not evince any very high degree of care. We think the true rule on this subject was stated in the first instruction given at the request of the plaintiff, whereby the jury was told that its inquiry should be upon this subject whether by reasonable examination and observation the defect could have been discovered by the company at the time of or before the delivery of the key to the brakeman.

Counsel have not called special attention to the other instructions, the refusal to give which is complained of, and it will be unnecessary for us to refer to them in detail. Those which correctly expressed the law were substantially covered by the court's instructions. Several of them, however, were objectionable, as withdrawing questions of negligence from the jury upon subjects upon which reasonable minds might draw different inferences.

It is urged that the evidence was insufficient to sustain the verdict. This assignment is based upon the argument made in the Wymore case, *supra*, that the company owed no duty to these people except not to wantonly injure them, and that their action in going along the company's tracks was negligence as a matter of law. It is unnecessary to reconsider these questions.

Judgment affirmed.

CHICAGO, BURLINGTON & QUINCY RAILROAD  
COMPANY v. PUTNAM.*Supreme Court, Nebraska, June, 1895.*

[Reported in 45 Neb. 440.]

PLEADING AND PRACTICE — NEGLIGENCE — INSTRUCTIONS. — In an action to recover damages for personal injuries alleged to be caused by the negligence of another, it is not necessary for the plaintiff, in his petition, to plead the particular precautions he took to avoid injury.

In such an action where the court correctly instructs the jury as to what constitutes negligence and contributory negligence, it is not, in general, erroneous to refuse instructions, directing the attention of the jury to special facts in the case, as demanding greater care than usual (1).

Evidence examined, and *held* to sustain the verdict.

(Syllabus by the Court.)

ERROR to District Court, Lancaster County. From judgment for plaintiff, defendant brings error. The facts appear in the opinion. *Judgment affirmed.*

T. M. MARQUETT, J. A. KILROY, and J. W. DEWEESE, for plaintiff in error.

ADAMS & SCOTT, for defendant in error.

**Irvine, C.** — Putnam was at work on a public highway which crossed the tracks of the railroad company. He, with others, was engaged in operating a grading machine propelled by twelve horses. He attempted to cross the track of the railroad with that machine, for the purpose of turning it. When a train approaching collided with the machine and horses, throwing the plaintiff to the ground in such manner that, in the language of the petition, plaintiff was "tramped, injured, and bruised by such said locomotive and cars and said horses and plow." He sued the railroad company for the personal injuries so received, alleging that the company was negligent in running a special train, out of the usual time, at a high rate of speed, and without giving any signal of its approach to the crossing. He recovered a verdict and judgment for \$200, which the railroad company seeks to reverse.

The first contention is that the petition did not state a cause of action, and this contention is based upon the proposition that

1. See notes of Nebraska cases, at end of this case, relating to collisions and crossings.

the petition does not disclose, by specific facts pleaded, that the plaintiff was himself in the exercise of due care. It is the established law of this State that, where the plaintiff proves his case without disclosing negligence on his part, contributory negligence is a matter of defense, the burden of proving which is on the defendant. *Anderson v. Railroad Co.*, 35 Neb. 95; *City of Lincoln v. Walker*, 18 Neb. 244. If this is true, it follows that unless the plaintiff, by the facts which he pleads, disclose contributory negligence, the defendant, by proper pleading, must raise the defense. The plaintiff in this case alleged generally that the injury was inflicted upon him without any fault upon his part. This was sufficient. He was not required to plead affirmatively the particular precautions he took, because, under the rulings referred to, he was not obliged affirmatively to prove them. It was just as much necessary for the railroad company to make out this defense — to plead affirmatively the facts constituting contributory negligence on the part of the plaintiff — as it was for the plaintiff to plead negligence on the part of the company.

Error is assigned on the refusal of the court to give a number of instructions requested by the company. One of these was a peremptory instruction to find for the defendant because contributory negligence was shown. We shall consider this subject later. One was a general instruction to the effect that, if the plaintiff was negligent in going upon the crossing without looking for approaching trains, then he could not recover. This point was covered by a proper instruction on the question of contributory negligence given by the court of its own motion. All the other instructions requested were specific instructions in regard to the degree of care to be exercised under certain circumstances. A fair sample of these instructions is one to the effect that, if the approach to the crossing was obstructed, it was all the more the plaintiff's duty, because of that fact, to ascertain, before going upon it, whether a train was approaching. It is not always erroneous, and it is sometimes quite proper, for the trial court to direct the attention of the jury to special features of the case which might affect the judgment of a man of ordinary prudence, and govern his conduct. But it is doubtful whether error could be predicated upon the refusal of the court to give such an instruction in any case where, by other instructions, the test of negligence is properly defined. It has been, over and over

again, decided by this court that, even where the facts are undisputed, questions of negligence and contributory negligence are for the jury, where different minds may reasonably draw different conclusions upon the subject. The court here left these questions to the jury, under proper instructions as to what constitutes negligence and contributory negligence; and when the court had told the jury, as it did, that negligence was the absence of such care, forethought, and prudence, as, under the circumstances surrounding the case, duty required should be given or exercised; that the statute required the giving of certain signals, in approaching the crossing, and that the jury should determine whether the accident was caused by negligence of the railroad company in failing to give such signals; and, further, that the plaintiff was required, in crossing, to use such care as persons of ordinary intelligence and prudence would exercise under like circumstances, — this was as far as the court was required to go, and no error was committed in refusing to instruct more specifically. If the instructions asked could have been given without error, it would only be because the facts stated in them left the inferences so free from reasonable doubt that the province of the jury was not interfered with.

It is argued that the verdict is not sustained by the evidence, because the uncontradicted evidence disclosed contributory negligence on the part of the plaintiff. This argument is based largely upon the proposition that he did not, before attempting to cross, look along the track for approaching trains. It is not necessary to inquire whether in all cases, or in this particular case, the failure to look for trains before attempting to cross would present a state of facts so conclusive of negligence as to bar recovery, because the plaintiff testified that before crossing he did look, and saw no train.

Under all the evidence in the case, we think the court was justified in submitting it to the jury, and in refusing to set aside the verdict. Judgment affirmed.

NOTES OF NEBRASKA CASES RELATING TO ACCIDENTS  
ON RAILROAD TRACKS AND AT CROSSINGS.

Among the cases relating to collision and (other than those reported with the Nebraska of AM. NEG. CAS.) are the following:

cases of crossing accidents  
in this volume

*Horse frightened at obstruction at crossing — Railroad not liable.*

In *ATCHISON & NEBRASKA R. R. v. LOREE*, 4 Neb. 446 (1876) action for injuries sustained near crossing, judgment for plaintiff for \$5,000 was reversed, the official syllabus stating the case as follows:

"A petition charged that in attempting to cross a railroad track, on depot grounds of defendant, the horse which plaintiff was driving became frightened at 'an arrangement and scarecrow, caused by the placing of cars and other implements' near the crossing in such a manner as to present 'a horrid and frightful appearance,' whereby plaintiff was thrown from his buggy and injured. *Held*, that the facts stated were insufficient to constitute a cause of action against the railroad company.

"Where it appeared in evidence that the public highway was rendered unsafe for travel, by reason of a ditch dug across it by the railroad company, and plaintiff drove up to a crossing on the depot grounds of defendant, near which lay a hand car, bottom upwards, and another car loaded with wood extended partly over the crossing, but leaving sufficient room to pass, and plaintiff's horse shied at these cars, whereby plaintiff was thrown from his buggy and injured: *Held*, that the railroad company was not guilty of negligence in such an arrangement of its cars, and that a motion for nonsuit should have been sustained, or the jury directed to return a verdict for the defendant."

*Collision at railroad crossing between wagon and train.*

*OMAHA, NIOBRARA & BLACK HILLS R. R. Co. v. O'DONNELL*, 22 Neb. 475 (1887), crossing accident; judgment for plaintiff affirmed; personal injury and destruction of team, harness and wagon at railroad crossing; verdict for plaintiff for \$5,500 set aside and new trial granted; on second trial verdict for \$5,000 and judgment accordingly; appeal by defendant; judgment affirmed.

*Person riding on horseback falling from horse and run over by street car.*

*BROOKS v. LINCOLN STREET R'y Co.*, 22 Neb. 816 (1888), plaintiff, under twenty-one years of age, riding on horseback, injured by street car, his horse having stumbled and thrown him in front of car; judgment for defendant reversed, it being held that "it is not negligence *per se* to travel along a public highway by the side of a street-railway track on which a car is moving in the same direction as the party traveling, unless such party places himself in such position as to be run over or injured by such street car."

*Vehicle and street car in collision.*

OMAHA STREET R'Y CO. *v.* CAMERON, 43 Neb. 297 (1895), collision between vehicle and street car at street crossing; judgment for plaintiff affirmed.

*Vehicle and train in collision.*

CHICAGO, BURLINGTON & QUINCY R. R. Co. *v.* Metcalf, 44 Neb. 848 (1895), team and wagon injured in collision with train; judgment for plaintiff reversed for erroneous instruction as to damages.

*Contributory negligence in walking on track.*

SWINDELL *v.* CHICAGO, BURLINGTON & QUINCY R. R. Co., 44 Neb. 841 (1895), person walking along track killed by train; contributory negligence; judgment for defendant affirmed.

*Defective crossing.*

BURLINGTON & M. R. R. Co. *v.* KOONCE, 34 Neb. 479 (1892), horse being driven at crossing injured by defective planking; judgment for plaintiff for \$100 affirmed; it was held that "it is the duty of every railroad company in this State to properly construct and maintain in good repair crossings over all public highways on the line of its road, so that the same shall be safe and convenient for travelers, so far as it can do so without interfering with the safe operation of the railroad. If it is negligent in that respect, and by reason thereof a person without fault is injured in his property while traveling over a defective crossing, the corporation owning or operating such railroad is liable for the damages sustained."

The KOONCE case ruling was followed in OMAHA & REPUBLICAN VALLEY R. R. Co. *v.* RYBURN, 40 Neb. 87 (1894), where plaintiff was injured by a fall upon a defective crossing.

*Struck by train while walking across track.*

UNION PACIFIC R'Y Co. *v.* MERTES, 35 Neb. 204 (1892), person crossing track struck by train; judgment for \$1,000 affirmed; it was held that "although a party may have negligently exposed himself to an injury, yet if the defendant, after discovering his exposed situation, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages;" ruling affirmed on subsequent decision (motion for rehearing having been granted) in the MERTES case, 39 Neb. 448 (1894), where judgment of District Court was reversed on ground of insufficiency of evidence of defendant's negligence.



*Horse frightened by noise of train at crossing.*

OMAHA & REPUBLICAN VALLEY R'y Co. v. BRADY, 39 Neb. 27 (1894), person crossing track in wagon injured by horse becoming frightened at noise of train, running away and throwing plaintiff under wagon; verdict for \$7,000; remittitur of \$5,000; judgment for \$2,000 affirmed on filing of remittitur.

The BRADY case followed and reaffirmed in STEPHENS v. OMAHA & REPUBLICAN VALLEY R. R. Co., 41 Neb. 167 (1894), horse taking fright at noise of train at crossing; judgment for defendant.

OMAHA & REPUBLICAN VALLEY R'y Co. v. CLARKE, 39 Neb. 65 (1894), horses frightened by noise of steam from engine at street crossing, and plaintiff thrown from wagon; judgment for plaintiff reversed; former decision in 35 Neb. 867.

*Street car colliding with horse person was riding.*

OMAHA STREET R'y Co. v. DUVAL, 40 Neb. 29 (1894), collision between street car and plaintiff's horse which he was riding; judgment for plaintiff for \$4,330 affirmed.

*Collision at crossing — Failure to look and listen.*

OMAHA & REPUBLICAN VALLEY R'y Co. v. TALBOT, 48 Neb. 627 (1896), collision between wagon and train at crossing; failure to look and listen; judgment for plaintiff reversed.

*Speed of train not evidence of negligence.*

In OMAHA & REPUBLICAN VALLEY R'y Co. v. KRAYENBUHL, 48 Neb. 553 (1896), it was held that the rate of speed, however great, is not sufficient to establish negligence in the operation of trains outside of towns and villages.

As to speed of trains, see also MEYER v. MIDLAND, ETC., R. R. Co., 2 Neb. 319.

## ACCIDENTS TO CHILDREN ON TRACK.

For accidents to children injured while on railroad tracks, cases decided in Nebraska, see the following:

CHILD PLAYING ON TRACK STRUCK BY CONSTRUCTION TRAIN — RAILROAD NOT LIABLE. — In MEYER v. MIDLAND PACIFIC R. R. Co., 2 Neb. 319 (1873), the statement of facts shows the following: "The plaintiff was a girl of three and a half years of age, and the defendants were the Midland Pacific R. R. Co. and the members of the firm of J. N. Convers & Co., contractors for building the railroad company's railroad. On May 21, 1870, while the contractors were constructing, operating, and had

exclusive possession and control of the road, a construction train ran over and killed a brother of the plaintiff, about two years old, and seriously injured the plaintiff, so that it was necessary to amputate her leg. The accident occurred in Nebraska city, where Eleventh street crosses the railroad track. At this point a ditch had been dug by the contractors across the track, about two feet wide and six or eight inches deep, for the purpose of passing the surface water from one side of the road to the other. It was not certainly and clearly shown how the children came to be on the track; but the evidence tended strongly to show that they were playing on the track; and, just as the train was coming up, they were in the ditch, not visible to the engineer, and suddenly raised up when it was too late to stop the train. On trial in Otoe county District Court there was verdict for plaintiff for \$10,000." Defendant appealed from the judgment, which was reversed, the court holding, after a careful consideration of the case, that the verdict was clearly against the weight of the evidence.

*Child walking on track struck by train.*

OMAHA & REPUBLICAN VALLEY R. R. CO. *v.* COOK, 37 Neb. 435 (1893), child thirteen years old, walking on track struck by train; judgment for plaintiff affirmed; subsequent decision in the Cook case, 42 Neb. 577 (1894), judgment affirmed; supplemental motion for rehearing in the Cook case, overruled, 42 Neb. 905 (1895), where it was held that "the engineer in charge of a railroad train may presume that a trespasser discovered on the track is in possession of his senses, that he will appreciate the danger, and act with discretion. He is, therefore, under no obligation to stop his train or even lessen the speed thereof before discovering that such trespasser is in imminent danger of personal injury. Such presumption has no application to persons incapable of caring for themselves, such as the very young and the helpless."

*Child run over at crossing.*

CHICAGO, BURLINGTON & QUINCY R. R. CO. *v.* GRABLIN, 38 Neb. 90 (1893), boy nine years old on railroad track run over and killed by train running at great speed; judgment for plaintiff reversed.

MISSOURI PACIFIC R'Y CO. *v.* GEIST, 49 Neb. 489 (1896), girl six years old run over at crossing; judgment for plaintiff reversed for erroneous instructions as to giving signals.

*Child walking on track struck by train.*

MISSOURI PACIFIC R'Y CO. *v.* HANSEN, 48 Neb. 232 (1896), child twelve years of age walking on track struck by train; judgment for

\$11,000 reversed, the syllabus stating: "That a passenger train was run at the rate of twenty-five miles per hour outside the limits of a city or town, even in a thickly-settled neighborhood and at a point where some persons were accustomed to walk upon the tracks, is not in itself and alone sufficient evidence of negligence. In a case where it is sought to hold the railroad liable because of such rate of speed, the jury, on proper request, should be so instructed."

*Animals injured on track.*

Among the Nebraska cases relating to animals killed or injured by trains, are the following:

B. & M. R. R. Co. v. Webb, 18 Neb. 215; U. P. R. R. Co. v. High, 14 Neb. 14; C. B. & Q. R. R. Co. v. Sims, 17 Neb. 691; B. & M. R. R. Co. v. Brinkman, 14 Neb. 70; B. & M. R. R. Co. v. Franzen, 15 Neb. 365; Mo. Pac. R'y Co. v. Metzger, 24 Neb. 90; U. P. R. R. Co. v. Schwenck, 13 Neb. 478; U. P. R. Co. v. Blum, 23 Neb. 404; C. B. & Q. R. Co. v. James, 26 Neb. 188; Mo. Pac. R. Co. v. Vandeventer, 28 Neb. 112; B. & M. R. Co. v. Shoemaker, 18 Neb. 369; C. B. & Q. R. Co. v. Hogan, 27 Neb. 801; B. & M. R. Co. v. Wendt, 12 Neb. 70; Fremont, E. & M. V. R. Co. v. Pounder, 36 Neb. 247; Union Pac. R. Co. v. Knowlton, 43 Neb. 751; C. B. & Q. R. Co. v. Hildebrand, 42 Neb. 33; Grand Island & W. C. R. Co. v. Phipps, 48 Neb. 493; U. P. R'y Co. v. Rassmussen, 25 Neb. 810.

NOTES OF NEVADA CASES RELATING TO COLLISIONS AND CROSSINGS.

The following cases relate to decisions in Nevada in actions arising out of accidents at crossings or on track:

*Person walking along track struck by backing engine.*

SOLENN v. VIRGINIA & TRUCKEE R. R. CO., 13 Nev. 106 (1878), person walking along track struck by locomotive or tender backing along track near regular crossing; verdict for plaintiff for \$15,000; judgment on verdict affirmed; opinion by HAWLEY, Ch. J., discussed very fully the duty and liability of railroad companies and that of travelers, as to persons on track, citing numerous authorities. On motion for rehearing judgment affirmed.

*Defective private way on track — Person driving injured.*

FERGUSON v. VIRGINIA & TRUCKEE R. R. CO., 13 Nev. 184 (1878), injuries received while driving along alleged defective private way over railroad track; demurrer to complaint; judgment for defendant affirmed, but on rehearing demurrer overruled and judgment reversed.

*Collision between train and vehicle at crossing.*

BUNTING *v.* CENTRAL PACIFIC R. R. CO., and HARRISON *v.* CENTRAL PACIFIC R. R. CO., 14 Nev. 351 (1879), collision between wagon and train at crossing; judgment of nonsuit reversed. See subsequent decision, 16 Nev. 277 (1881), in which judgment for plaintiff was affirmed.

COHEN *v.* EUREKA & PALISADE R. R. CO., 14 Nev. 376 (1879), collision of wagon and team with train at crossing; judgment for plaintiff for \$1,875 reversed for erroneous instruction that it was duty of railroad servants "to approach the crossing at such rate of speed as would enable them to check the train, if necessary."

*Animal killed on track.*

See WALSH *v.* VIRGINIA & TRUCKEE R. R. CO., 8 Nev. 110 (1872), where plaintiff's cow, which had strayed on track, was killed by train, and judgment of nonsuit rendered, which, on appeal, was affirmed, it being held that mere killing of domestic animal by a train is not evidence of negligence, and that plaintiff must show that the killing was caused by railroad company's negligence.

## NEW HAMPSHIRE CASES RELATING TO ACCIDENTS AT CROSSINGS OR ON TRACK.

Among the New Hampshire cases relating to collisions and crossings are the following:

*Pedestrian struck by train at grade crossing.*

IN STATE *v.* MANCHESTER & LAWRENCE R. R., 52 N. H. 528 (1873), an indictment, under the statute (Gen. St., ch. 264, § 14), for the negligent killing of one Woodbury, who was struck by a train of defendant's at a grade crossing, judgment was rendered on the verdict of guilty returned by the jury. The court (per SARGENT, Ch. J.) discussed the case and points at length, reviewing the authorities on negligence and contributory negligence, remote and proximate cause, etc.

See also SMITH *v.* EASTERN R. R., 35 N. H. 356 (animal killed on track), on the question of negligence.

*Horse frightened at noise of train at crossing.*

GORDON *v.* BOSTON & MAINE R. R., 58 N. H. 396 (1878), horse frightened at noise of steam from locomotive at crossing, and plaintiff thrown out of wagon and injured; judgment on verdict for plaintiff.

See also *LEWIS v. EASTERN R. R.*, 60 N. H. 187 (1880), where verdict for plaintiff was set aside, the *GORDON* case being distinguished from the facts in this case.

*Collision between vehicle and lumber train.*

*PAINE v. GRAND TRUNK R'Y OF CANADA*, 58 N. H. 611 (1879), injury to plaintiff while attempting, with horse and wagon, to cross track at highway crossing which was occupied by part of defendant's lumber train; judgment on verdict for plaintiff.

*Killed while driving across track.*

*HUNTRESS, ADM'R v. BOSTON & MAINE R. R.*, 66 N. H. 185 (1890), plaintiff's intestate killed by train while attempting to drive across track; judgment on verdict for plaintiff.

*Run over by street car.*

*BLY, ADM'R v. NASHUA STREET R'Y*, 67 N. H. 474 (1893), plaintiff's intestate run over by street car going at speed faster than provided by statute; verdict for plaintiff.

*Intoxicated person on track run over by street car.*

*EDGERLY, ADM'R, v. UNION STREET R. R. Co.*, 67 N. H. 313 (1892), intoxicated person lying on track run over and killed by street car; verdict for plaintiff set aside.

*Collision between vehicles.*

*BREMBER v. JONES*, 67 N. H. 374 (1892), collision between vehicles on highway; burden of proof on plaintiff; judgment for defendant.

*Collision at crossing.*

*DAVIS v. CONCORD & MONTREAL R. R.*, 68 N. H. 247 (1894), person driving over highway crossing killed by train; verdict for plaintiff.

See also *NUTTER v. BOSTON & MAINE R. R.*, 60 N. H. 483 (1881), plaintiff run over at street crossing.

*Run over in railroad yard.*

*MITCHELL v. BOSTON & MAINE R. R.*, 68 N. H. 96 (1894), plaintiff, attending to cattle train in railroad yard, run over on track; judgment on verdict for plaintiff.

## NEW JERSEY EXPRESS COMPANY v. NICHOLS (1).

*Court of Errors and Appeals, New Jersey, November Term, 1867.*

[Reported in 4 Vr. (33 N. J. L.) 434.]

DEPOSITION — STATUTE — WITNESS — MEASURE OF DAMAGES — NEGLIGENCE — BURDEN OF PROOF — CONTRIBUTORY NEGLIGENCE — NONSUIT — PEDESTRIAN STRUCK BY WAGON ON SIDEWALK. — 1. Where a deposition is taken before a master in chancery in this State, in the presence of the counsel of the parties, the court will infer from his certificate that the witness was duly sworn — that the witness was sworn in accordance with the requirements of the statute authorizing the taking of depositions.

2. That the witness who was the plaintiff, during his cross-examination conferred with his counsel privately, notwithstanding the objections of the opposite counsel, will not make his deposition incompetent evidence; it is a circumstance that goes only to his credibility.
3. In an action to recover damages for personal injuries sustained by the negligence of the defendant, whereby the plaintiff, who was an architect, was incapacitated from pursuing his business, evidence of the nature and extent of his business is competent to go to the jury, not as furnishing a measure of damages, but to guide them in the exercise of that discretion as to the amount of damages which, to a certain extent, is vested in a jury in such cases; and, for this purpose, it is competent to inquire of him as to the average annual income he has realized from his business.
4. The plaintiff, in an action for injuries resulting from the negligence of the defendant, is not bound, as part of his case, to show affirmatively that the injury was not occasioned or contributed to by any negligence on his part.
5. But if it appears by the plaintiff's evidence when he rests his case that his own negligence contributed to the injury for which he sues, it is the duty of the court to nonsuit, and in such cases a writ of error will lie for the refusal to grant the nonsuit.
6. To conclude a plaintiff from maintaining an action to recover damages for injuries occasioned by the negligence of a defendant, on the ground that the injury was contributed to by his own conduct, it must appear that the plaintiff's conduct was negligent, and that his negligence contributed to the injury in such a manner that if he had not been negligent he would have received no injury from the negligence of the defendant.
7. If the injury was contributed to in this sense by the plaintiff's negligence, the comparative degrees of the negligence of the parties is immaterial. If the injury was occasioned in any degree by the plaintiff's own negligence, he is without redress, unless the act of the defendant amounted to a wilful trespass or intentional wrong.

(Official syllabus to the Report.)

1. See *NEW JERSEY EXPRESS COMPANY* judgment for plaintiff below was *v. NICHOLS*, 3 Vr. (32 N. J. L.) 166 (1867). affirmed.  
same facts as in case at bar, where

IN ERROR to the Supreme Court. The facts appear in the opinion. *Judgment for plaintiff below affirmed.*

BORCHERLING & WILLIAMSON, for plaintiff in error.

C. PARKER, for defendant in error.

**Depue, J.** — This action was brought by the defendant in error against the plaintiffs in error, to recover damages for personal injuries received by him through the negligence of the driver of one of the wagons of the express company, in backing his wagon on the sidewalk of Lawrence street, in the city of Newark, whereby the plaintiff below was struck by the wagon and carried against an iron platform, and seriously injured.

At the trial several exceptions were taken to the ruling of the court. The verdict was for the plaintiff below, and on writ of error to the Supreme Court the judgment was affirmed.

The first exception relied on was to the admission of the deposition of the plaintiff, taken under the act authorizing commissions and the taking of depositions. Nix. Dig. 924. The deposition was taken before a master in chancery in this State, in the presence of the counsel of the respective parties. The officer certifies that the witness, who was the plaintiff, was duly sworn. The certificate does not state, in the words of the seventh section of the statute, that the witness was sworn to testify the whole truth. The act does not require the officer to certify the manner in which the oath was administered. In this respect the seventh section is only directory; and where the deposition is taken in the State, before an officer of the court, and in the presence of the counsel of both parties, the court will imply from the certificate of the commissioner that the witness was duly sworn — that the oath was administered in the legal form. *Ludlam v. Broderick*, 3 Green, 269, 272; *Burley v. Kitchell*, *Spencer*, 205; *Halleron v. Field*, 23 Wend. 38.

The defendant's counsel further objected to the reception of the deposition in evidence, on the ground that the witness during his cross-examination, conferred with his own counsel, notwithstanding the objection of the defendant's counsel. Assuming that the conference was in relation to the answers the witness should give to questions which might be put to him on cross-examination, it would afford no ground for excluding his deposition. The witness was a competent witness, and his evidence was taken in a manner made lawful by statute, and in accordance therewith. That he was guilty of the indelicacy of

holding a conference with his counsel during the examination did not make him an incompetent witness. It is a circumstance that should affect his credibility, but would not warrant the excluding of his deposition. *Commercial Bank v. Union Bank*, 19 Barb. 392; s. c., 1 Kernan, 203.

The plaintiff, on his examination-in-chief, after proving that his business was that of an architect, was asked the following question: "What was your average annual profits in your business?" To which he answered: "The average was about twenty-five hundred dollars—that is, the average income."

When the deposition was offered to be read in evidence, the defendant's counsel objected to the reading of this question and answer, for the reason that, if read in evidence, and allowed by the court to be considered by the jury, it would tend to lead the jury to an indefinite inquiry, which would be contrary to law. The court overruled the objection, and permitted the question and answer to be read to the jury. In actions founded on contract, evidence of the loss of profits resulting from non-performance has, in some instances, been rejected as too speculative and uncertain to be made the means of arriving at compensation as the measure of damages. But in actions of tort, where the *quantum* of damages is very much within the discretion of the jury, evidence of the nature and extent of the plaintiff's business, and the general rate of profit he has realized therefrom, which has been interrupted by the defendant's wrongful act, is properly received, not on the ground of its furnishing a measure of damages to be adopted by the jury, but to be taken into consideration by the jury to guide them in the exercise of that discretion which, to a certain extent, is always vested in the jury. *Sedg. Dam.*, 92; *Ingram v. Lawson*, 6 Bing. N. C. 212 (1); *Allison v. Chandler*, 11 Mich. 543; *Taylor v. Dustin*, 43 N. H. 493; *Somans v. Brown*, 5 R. I. 299; *Wade v. Leroy*, 20 How. 34; *Lincoln v. Saratoga & Schenectady R. R. Co.*, 23 Wend. 425.

The plaintiff was an architect—a business depending on his

1. In *Ingram v. Lawson*, 6 Bing. N. C. 212, it was held that a statement in a newspaper that a ship, of which plaintiff was owner and master, and which he had advertised for a voyage to the East Indies, was not a seaworthy ship, and that Jews had bought her to take out convicts, is a libel on the plaintiff in his trade and business, for which he may recover damages without proof of malice on an allegation of special damage. And, in an action brought for such a libel, the ordinary profits of a voyage are the proper measure of damages.



personal services as much as that of a common laborer, a clerk, or a mechanic, and his emoluments were the result of his own earnings. By reason of the injuries he received he was for a time incapacitated from pursuing his occupation and sustained damages by reason thereof. These damages resulted proximately from the wrongful act of the defendant's servants and obviously should be included in the compensation to be awarded to him. To what extent he had sustained pecuniary injury in that respect must depend upon the nature and extent of his business; and the jury would not be in a condition to reach any correct conclusion on that subject, unless they had before them some evidence of the value of the services to himself.

The evidence was competent in the cause to go to the jury, to be taken into consideration by them, and allowed such weight as they, in the exercise of good sense and sound discretion, should think it entitled to.

No exception was taken to the charge of the court as to the effect to be given to the evidence, and it is to be presumed that the jury were rightfully instructed on the subject.

When the plaintiff rested his case a motion was made to nonsuit, on the ground that the plaintiff, by his own evidence, was not entitled to recover.

The reasons assigned in the court below why the nonsuit should be granted were, as appears by the bill of exceptions, that the plaintiff was bound to prove not only that the injury by him sustained was caused substantially and proximately by the negligence of the defendants, but also that the plaintiff was free from negligence, and did not, by his own conduct, contribute to the injury complained of; and the plaintiff in this case having failed to make proof accordingly, that the said defendants were entitled to a nonsuit. The judge overruled this motion, and this constitutes the fourth exception relied on.

This exception proceeds upon the ground that the plaintiff in an action for injuries occasioned by negligence is bound to prove affirmatively, as part of his case, that the injury he complains of was not occasioned or contributed to by any negligence on his part. The law in this State has been settled otherwise in this court, in *Durant v. Palmer*, 5 Dutcher, 544, 547; and at the present term, in the case of *Drake v. Mount* (4 Vr. 441), this court considered that question so completely set at rest that we refused to hear an argument on the point. It is, undoubtedly,

the law of this State that if it appears by the plaintiff's evidence that his own negligence contributed to the injury, it is the duty of the court to nonsuit, and a writ of error will lie for the refusal to grant a nonsuit in such cases. *Central R. R. Co. v. Moore*, 4 Zab. 824; *Aycrigg's Executors v. N. Y. & Erie R. R. Co.*, 1 Vr. 460; *Harper v. Erie R. R. Co.*, 3 Vr. 88; *New Jersey R. R. Co. v. West*, 4 Vr. 430.

But the plaintiff is not, as a condition precedent to his right to maintain his action, bound to prove affirmatively that the injury was not contributed to by his own negligence, under the penalty of being nonsuited.

It is also assumed by the exception, and was argued here, that if the plaintiff, by his own conduct, contributed to the injury complained of, he cannot recover. This statement of the principle is incorrect. In many cases where the plaintiff's conduct was, to some extent, contributory to his injury, he has been allowed to recover. In fact, it would be difficult to conceive of any case in which the conduct of the party injured might not, in some sense, be said to have contributed to his injuries. To conclude him from maintaining his action his conduct must have been negligent, and his negligence must have contributed to the injury in such a way that if he had not been negligent, he would have received no injury from the negligence of the defendant. This is substantially the rule laid down in the cases cited above, and in *Runyon v. Central R. R. Co.*, 1 Dutcher, 566; *Telfer v. Northern R. R. Co.*, 1 Vroom, 188.

But if the plaintiff's negligence is established, the comparative degrees of the negligence of the parties is immaterial, for the reason that it would be impossible to say that, without such fault on his part, the occurrence would have happened. The injury must be attributable to the defendant's negligence, and to that alone; if occasioned in any degree by the plaintiff's own negligence, he is without redress. *Barnes v. Cole*, 21 Wend. 188; *Hartfield v. Roper*, 21 Wend. 615; *Simpson v. Hand*, 6 Whart. 311; *Hawkins v. Cooper*, 8 C. & P. 473 (1); *Smith v. Smith*, 2

1. In *Hawkins v. Cooper*, 8 C. & P. 473, an action for an injury to a person crossing a public highway by driving against and knocking him down, it was held that the jury must be satisfied that the injury was attributable to the negligence of the driver and to that alone, before they can find a verdict for the plaintiff; and if they think that it was occasioned in any degree by the improper conduct of the plaintiff in crossing the road in an incautious and imprudent manner, they must find their verdict for the defendant.

Pick. 621, 623; Wild's Adm'r *v.* Hudson River R. R. Co., 24 N. Y. 430. Unless the act of the defendant amounted to a wilful trespass or intentional wrong. Brownell *v.* Flagler, 5 Hill, 282; Wynn *v.* Allard, 5 W. & S. 524; Vandegrift *v.* Rediker, 2 Zab. 185, 189.

Negligence is a relative term, depending upon the circumstances under which the injury was received, and the obligation which rests on the party injured to care for his personal safety.

A person crossing a railroad track, though rightfully there, must be on the alert to avoid injury from trains that may happen to be passing; so one walking along the carriageway of a public street must exercise caution to escape being run over by vehicles; but a person walking along the sidewalk, which is appropriated exclusively to pedestrians, need not observe the same care as would be required of him in crossing the track of a railroad, or walking along the carriageway of a crowded street. If he observes as much care and circumspection as would serve to protect him from such dangers as are usually incident to walking on the sidewalks, he cannot be said to have omitted such precautions as would preclude him from maintaining an action for injuries he may receive from wagons wrongfully there, unless it appear that, being aware of the extraordinary risks to which he is exposed, he rashly places himself in the way of danger.

In this case the plaintiff was walking along the sidewalk of Lawrence street toward the Market street depot, in haste to catch a train to take passage for New York, in company with a friend, Mr. Beach, with whom he was engaged in conversation. When he approached near the corner of Lawrence and Market streets, he saw the wagon of the defendants being backed from the street toward the sidewalk. He stopped within two feet of the wheel of the wagon, to see what the driver intended to do. At that moment the wagon also stopped and stood still, within three feet and a half of the platform. While the plaintiff was standing still waiting to see what the driver would do, he heard a cry of stop from a man standing on the sidewalk, which he supposed was addressed to the driver, and presuming that the wagon had been stopped to let them through, the parties attempted to pass through, and at that moment the wagon was again started backwards. Mr. Beach got through in safety, but the plaintiff was caught between the wagon and the platform, and was injured.

The defendant's wagon was on the sidewalk in violation of a city ordinance and contrary to law. There was ample space between the wagon where it stopped and the platform to permit the plaintiff to pass in safety. He had a right to assume that the wagon had been stopped to allow him and his friend to pass, as was the duty of the driver, and was guilty of no negligence in making the effort.

It was said that he might have taken to the street, and thus avoided all danger.

It is a sufficient answer to say that he was under no obligation to do so. He had a right to the use of the sidewalk and was under no obligation to surrender it to the defendant's wagon, which was wrongfully on the sidewalk.

There is no error in the judgment below, and it must be affirmed.

*For affirmance:* THE CHANCELLOR, VREDENBURGH, WOODHULL, DEPUE, DALRIMPLE, OGDEN, FORT, WALES, VAIL, KENNEDY. *For reversal:* NONE.

## PENNSYLVANIA RAILROAD COMPANY v. RIGHTER AND WIFE.

*Court of Errors and Appeals, New Jersey, March Term, 1880.*

[Reported in 13 Vr. (42 N. J. L.) 180.]

CONTRIBUTORY NEGLIGENCE — PROXIMATE CAUSE — QUESTION FOR JURY — NONSUIT — DUTY OF TRAVELER AT CROSSING — LOOKING AND LISTENING — FAILURE TO SIGNAL — DRIVING ACROSS TRACK AND COLLIDING WITH TRAIN — DRIVER'S NEGLIGENCE. — 1. It is a part of the rule of contributory negligence that the plaintiff's negligent act must proximately contribute to his injury; but if it so contribute, the comparative degrees of the plaintiff's and defendant's negligence will not be considered.

2. If the case presents a fairly debatable question whether the plaintiff's negligent conduct did so contribute, the solution of that question is for the jury; but if it clearly appears that such conduct did contribute, then the court should direct a nonsuit.
3. It is a primary rule of legal caution that a person about to cross a railroad is bound to use his eyes and ears, to watch for signboards and signals, to listen for bell and whistle, and to guard against the approach of trains by looking each way before crossing (1).

1. The constant reference to the authorities upon the duty of travel-  
Righter case, in collision and crossing ers, and the rule of contributory negli-  
cases in other States, and its review of gence, renders it an interesting and

4. The failure of the company to provide or give a statutory signal will not relieve a person from making this observation, if he has an opportunity, by a view of the road, to avoid danger.
5. A servant driving a carriage along a street crossing a railroad, and having, while yet at a point distant over thirty feet from the railroad track, a view of the same for a mile to the south, drove across the track, and the rear of his wagon was struck by a train coming from the south, and the wagon was demolished and the persons within it injured. *Held:*

That the negligent act of the servant contributed to the injury.

That the fact that a train was just starting from the station one-quarter of a mile north, and blowing a whistle, could not have distracted the servant's attention so as to relieve him from his duty to look south.

(Official syllabus to the Report.)

"AN ACTION was brought by Mr. Righter and wife against the Pennsylvania Railroad Company for damages occasioned by a collision between a train of the company and a carriage of the plaintiff below, driven by his servant, and containing, as occupants, Mrs. Righter and two daughters. At the trial a verdict was returned in favor of the plaintiffs. The present writ of error brings up the judgment thereon and the record of the proceedings upon the trial."

The facts of the case appear in the opinion. *Judgment reversed.*

JOHN P. JACKSON and E. T. GREEN, for plaintiff in error (Pennsylvania R. R. Co.).

THOMAS N. MCCARTER, for defendants in error.

**Reed, J.** — The first and leading contention of the counsel for the plaintiffs in error is that the plaintiffs below should have been nonsuited at the trial. This is claimed upon the ground that, from the case there made by the plaintiffs, it clearly appeared that the negligent act of the plaintiffs' servant contributed to the causation of the collision by which the plaintiffs' family was injured.

The legal rule that where a person receiving an injury has, by

important case upon the subject treated in this volume of *AM. NEG. CAS.*, and a leading one upon the topic in the State of New Jersey. The rule as to looking and listening at railroad crossings is ably and clearly set forth in the opinion of REED, J., and the grounds of the learned judge for reversing the judgment rendered by the trial court for plaintiff, are acquiesced in by six

of his colleagues who vote for reversal, while three others of his colleagues stand for affirmance.

The several cases cited in the opinion of the case at bar, will be found reported in this volume, and also vol. 11 of *AM. NEG. CAS.* A few will be found in vols. 9 and 10 of the series of *AM. NEG. CAS.*

his own negligent conduct, partly aided in occasioning the injury, he cannot recover from the other party whose act assisted, has been so often asserted in the courts of this State that a restatement of the doctrine, on the ground upon which it rests, would be wasted labor. *Moore v. Central R. R. Co.*, 4 Zab. 824; *Runyon v. Central R. R. Co.*, 1 Dutcher, 556; *Telfer v. Northern R. R. Co.*, 1 Vroom, 188; *Harper v. Erie R. R. Co.*, 3 Vroom, 88; *Matthews v. Penn. R. R. Co.*, 7 Vroom, 531; *Toffey v. Del., Lack. & Western R. R. Co.*, 9 Vroom, 525; *Bonnell v. Del., L. & W. R. R. Co.*, 10 Vroom, 189 (1).

It is settled, as part of this rule, that the negligent act of the plaintiff must contribute, proximately, to the injury, else the right of the plaintiff to recover will not be defeated by such act.

If, in spite of his negligent act, the injury would have occurred by means of the negligent conduct of the defendant, or if the injury is disconnected from his act by an independent cause, then there is no legal contribution to the injury. *Moore v. Central R. R. Co.*, 4 Zab. 824; *Van Horn v. Central R. R. Co.*, 9 Vroom, 133; *Shearm. & Redf. on Neg.*, § 33; *Wharton on Neg.*, § 331.

It is also settled that the comparative degrees of the negligence of the respective parties will not control the question of liability, but that if the plaintiff, in any degree, proximately contributed to the injury, he cannot recover. *Drake v. Mount*, 4 Vroom, 441; *Haslan v. M. & E. R. R. Co.*, 4 Vroom, 147 (2); *Shearm. & Redf. on Neg.*, § 37; *Wharton on Neg.*, § 334.

It is also settled that if the case presents a fairly debatable question whether the plaintiff's negligent conduct so contributed, the solution of that question is for the jury; but if it clearly appears that such conduct did contribute to the production of the injury, then the court should control the case and direct a nonsuit. *Moore v. Central R. R. Co.*, 4 Zab. 824; *Runyon v. Central R. R. Co.*, 1 Dutcher, 556; *Aycrigg v. N. Y. & Erie R. R. Co.*, 1 Vroom, 460; *Harper v. Erie R. R. Co.*, 3 Vroom, 88; *Matthews v. Penn. Central R. R. Co.*, 7 Vroom, 531; *Toffey v.*

1. See these cases reported with the New Jersey cases in this volume of AM. NEG. CAS. 2. Reported with the New Jersey cases in this volume.

Del., Lack. & W. R. R. Co., 9 Vroom, 525; *Bonnell v. Del., L. & W. R. R. Co.*, 10 Vroom, 189 (1).

Does the evidence taken at the trial, in this case, show a clear case of negligence on the part of the plaintiff's servant contributing, proximately, to the cause of the injury in question?

The question of the presence or absence of negligence must be largely dependent upon the circumstances surrounding each case.

The test is the absence of such caution as a person of ordinary prudence would exercise under the circumstances.

The degree of care which a person is called upon to exert rises and falls with the danger to himself and to others who are dependent upon his conduct.

A person dealing with noxious chemicals or dangerous machinery is chargeable with a high degree of vigilance, because the natural result of a less degree of care is disaster to life and property.

Upon the managers of a railroad, compelled to use fire and powerful engines and swift trains, which, by the least mismanagement, may occasion terrible injury to life and devastation to property, is thrown a liability to use a degree of care commensurate with the risk. *Salmon v. Del., L. & W. R. R. Co.*, 10 Vroom, 299; *West v. New Jersey R. R. & T. Co.*, 3 Vroom, 91; *Klein v. Jewett*, 11 C. E. Green, 474, 12 C. E. Green, 550, 5 Am. Neg. Cas. 1; *Bradley v. Boston & Maine R. R. Co.*, 2 Cush. (Mass.) 539; *Chicago, B. & Q. R. R. Co. v. Stumps*, 55 Ill. 367, 11 Am. Neg. Cas. 390; *Wharton on Neg.*, § 798. And inasmuch as the exigencies of modern life have compelled the legalizing of these means of commerce, the law has imposed upon the citizen the duty of exercising the highest practicable degree of care in avoiding the danger to himself and the possible injury to those carried likely to be caused by a collision with or an obstruction of these trains. *Moore v. Central R. R. Co.*, 4 Zab. (268), 824; *Runyon v. Central R. R. Co.*, 1 Dutcher, 556; *Telfer v. Northern R. R. Co.*, 1 Vroom, 188 (2).

Perhaps no question has more frequently received the consideration of the courts than what conduct amounts to the exercise of the proper degree of care in avoiding a railway collision; and when we reflect that in this country alone, during every hour

1. These cases are reported with the 2. Reported in this volume of AM. New Jersey cases in this volume of AM. NEG. CAS., with the New Jersey cases. NEG. CAS.

of the day and night, hundreds of such trains are speeding through villages and across highways, it is only marvelous that the occasions for these judicial examinations are not still more frequent.

But the occasions have been sufficiently frequent to give the courts the opportunity to express considerable judicial sentiment upon the question, and that sentiment has been formulated into rules, which may be applied to the solution of almost every kindred question that may arise.

A primary rule of legal caution is that a person about to cross a railroad is bound to use his eyes and ears, to watch for sign-boards and signals, to listen for bell or whistle, and to guard against the approach of a train by looking each way before crossing. *Telfer v. Northern R. R. Co.*, 1 Vroom, 188; *Haslan v. M. & E. R. R. Co.*, 4 Vroom, 147; *Cliff v. Midland R. R. Co.*, 5 Q. B. 258 (1); *Stubley v. London & N. W. R. R. Co.*, L. R. 1 Exch. 13 (2); *Butterfield v. Western R. R. Co.*, 10 Allen (Mass.), 532; *Baxter v. Troy & Boston R. R. Co.*, 41 N. Y. 502. Nor will the fact that the company has failed to provide or give a statutory signal relieve the person from making this observation, if he has an opportunity, by a view of the road, to avoid danger. *Runyon v. Central R. R. Co.*, 1 Dutcher, 556; *McCall v. N. Y. Central R. R. Co.*, 54 N. Y. 642; *Ernst v. Hudson River R. R. Co.*, 39 N. Y. 61; *Phelps v. Ill. R. R. Co.*, 29 Ill. 447.

1. In *Cliff v. Midland R'y Co.*, L. R. 5 Q. B. 258, the facts were as follows: C., while passing along an occupation road which crossed a railway on a level, was knocked down and injured by a train, owing, as was alleged, to the negligence of the railroad company. There were gates across the road left unfastened, and the company had at one time kept a gatekeeper, but had ceased to keep one some time before the accident. About three years before the accident the company had obtained powers under an Act to make a new road and discontinue the level occupation road; the powers of the Act were to be exercised within five years, and then to cease; and nothing had been done as to the road until after the

accident. The jury negatived negligence in the driver of the engine; but found for the plaintiff on the ground generally of "negligence as to the crossing." The judge, in summing up, left to the jury, as evidence of negligence in the company, the omission to keep a gatekeeper, and the omission to exercise the powers of their Act. *Held*, a misdirection.

2. In *Stubley v. London & N. W. R'y Co.*, L. R. 1 Exch. 13, it was held that deafness of a person crossing a line of railway is contributory negligence in him if by reason of that defect he is unable to hear a warning given to him by the company's servants in charge at the crossing.



Upon turning to the testimony in the present case, the following facts appear: The wagon of Mr. Righter was, at the time of the collision, driven by Deany, a servant. He had driven along Jefferson avenue, which runs parallel with the railroad, and turned into Fairmount avenue, which crosses the railroad. It was in crossing the railroad on this avenue that the collision occurred. The place where Deany turned into Fairmount avenue is about 200 yards from the railroad. Before he reached the railroad he crossed Walnut street, a street running parallel with the railroad, and crossing Fairmount avenue 207 feet from the railroad. There is a slight descent from Jefferson avenue to Walnut street, but from Walnut street to the railroad it is about level. Fairmount avenue is eighty feet in width, and crosses the railroad at right angles. The railroad, where it crosses Fairmount avenue, has three tracks. The westerly track is for trains going south, the middle track for trains going north, and the easterly track is a switch and side track. The train which struck the wagon of the plaintiffs was going north, on the middle track; the wagon was crossing from east to west. About a quarter of a mile north from this crossing is the North Elizabeth station; about a mile south is the Central Elizabeth station. The track between them is nearly straight. In passing down Fairmount avenue from Walnut street, there was no difficulty in observing the approach of a train from the north. In the direction of the North Elizabeth station there were neither fences, houses nor trees to intercept the vision. In the other direction, from which the colliding train came, there were no fences or houses, but there were some trees. There were two or three trees growing on that side of Fairmount avenue, and there were a few trees growing on a line on the easterly side of the railroad, and about forty-seven feet from the middle track, but not on the company's land. Many of these trees were small, and between some there was considerable space. How much these trees intercepted the view of the track is not very clear, nor do I think it material. The railroad caution-post at the crossing at Fairmount avenue was twenty-five feet from the easterly track, and thirty-three or thirty-eight feet from the middle track. Standing on a line with this caution-post, in the middle of Fairmount avenue, the track was visible for a mile to the south.

This all appears from the testimony of Mr. Lehlbach, a witness for the plaintiffs.

Into this avenue, then, Deany, on the 22d of July, 1878, turned his wagon and drove down across Walnut street. He says that he stopped at Walnut street and listened. He saw a train standing at the North Elizabeth station; looked to the south and saw no train. He started on again, and when he came within 120 feet of the road he stopped again and pulled up his horses. He saw the train at the depot, and stood and looked and listened, and hearing no bell or whistle, he started on again; and when he got upon the side track — the horses on the other track — saw the train come flying right into him. It struck the rear part of the wagon and the persons therein were thrown out and injured.

Now, it clearly appears that whatever obstruction there was to prevent a view of the track to the south at any point on Fairmount avenue from Walnut street to the caution-post, yet when Deany came opposite that post, and while still more than thirty feet from the middle track, he had a clear field for observation. He says his horses were gentle. He says he was driving at a jog-trot.

I am unable to see any reason why, if he had used his eyes with any degree of care, he could not have seen the approaching train in time to arrest the progress of his carriage and avoid the collision. It was his duty to approach the track with caution, and to have his horses at such a gait and under such control as would allow him to arrest their movements at once. Deany himself does not say that he looked at that point. There is, however, the testimony of three witnesses, who say that they saw him look. But such testimony cannot aid the plaintiffs where it is clear that, if he looked with care, he must have seen the train. If a traveler, says Dr. Wharton, by looking along the road, could have seen an approaching train in time to escape, it would be presumed, in case of collision, that he did not look, or, looking, did not heed what he saw. Wharton on Neg., § 382.

It is said, or was said below, that there were facts which operated to interfere with Deany's discovery of the approaching train. There was a train standing at the North Elizabeth station, which was blowing off steam, which prevented, or might have prevented, his hearing the bell of the colliding train. But it is obvious, from the principles already enumerated, that this did not excuse the use of his eyes. He was bound to watch as well as listen.

Nor can the fact that the train was moving from another direction have any weight. When a person is confused by the presence of two dangers, and in endeavoring to avoid one meets the other, it will then, when it appears that such second danger was caused, not by want of care, but by terror or confusion likely to result from the situation, relieve the injured person from the imputation of negligence. This train, however, was a quarter of a mile away. It was just moving off. It could not have distracted the attention of Deany so as to have prevented his looking in the opposite direction, nor does he say that it did. It is also claimed that his view of the colliding train was intercepted by four platform-cars which stood on the siding. These cars were so low as to conceal only a part of the cars, and so located as to intercept the view of only a part of the train. I think that the absence of motion of these platform-cars would only render the motion of the train more perceptible. That the motion of an engine and a train of passenger cars could be so concealed by these platform-cars as to prevent the discovery of the approaching train by Deany does not seem to me possible.

I am compelled to the conclusion that the negligence of Deany was clear, and that it proximately contributed to the collision.

However unfortunate the result is to the plaintiffs, yet, by a well-settled rule of law, Deany's negligence is imputable to his employers, and they should, therefore, have been nonsuited below.

The judgment should be reversed.

*For affirmance:* DIXON, KNAPP and SCUDDER, JJ.; *for reversal:* THE CHANCELLOR, CHIEF JUSTICE, REED, VAN SYCKEL, DODD, GREEN and LATHROP. (Seven for reversal, and three for affirmance.)

**COLLISION BETWEEN WAGON AND TRAIN AT CROSSING — RAILROAD LIABLE.** — In **CENTRAL RAILROAD COMPANY OF NEW JERSEY v. MOORE**, 4 Zab. (24 N. J. L.) 824 (1854), action on the case, the declaration alleging that defendants "so carelessly, negligently, unskillfully and improperly ran, drove, governed and directed their locomotive, engine and cars" upon their railroad that thereby the plaintiff, who was driving his horses and wagon along a highway, across the railroad of the defendants, was run over and injured by the locomotive and cars, plaintiff's arm being fractured, judgment for plaintiff was affirmed, all the justices in the Court of Errors and Appeals at the June term, 1854,

concurring in affirmance. The following are the rulings in the case (as per syllabus to the report):

"1. A plaintiff suing for an injury, caused by the negligence of the defendant, will not be entitled to recover, if his own negligence contributed to the injury in such way that if he had been guilty of no negligence, he would have received no injury by that of the defendant.

"2. The law does not in such case require of the plaintiff the greatest possible caution. The caution required is the ordinary care which a prudent person would take under such circumstances, and what would constitute ordinary care varies with the circumstances. More vigilance and care is required in crossing a railroad track traveled by trains of a high, uncontrollable rate of speed than in crossing an ordinary highway.

"3. The negligence of the plaintiff to prevent his recovery must directly tend to produce the injury, or must be the proximate cause of it.

"4. Where the facts are clear and undisputed, and show a want of ordinary care on the part of the plaintiff, the question is for the court to decide; but if the evidence is doubtful and contradictory, and the inference to be drawn from it questioned, it is for the jury to determine.

"5. Where the evidence of the plaintiff shows, without contradiction, a want of ordinary care on his part, it is the duty of the court when requested to order him to be nonsuited, and if the court refuses so to do, the defendant is entitled to his bill of exceptions, and the judgment will be reversed. But when the court wrongfully orders the plaintiff to be nonsuited, and he submits, it is doubtful whether he can have his bill of exceptions, or bring a writ of error (ELMER, J.)." Refusal of Somerset Circuit Court to nonsuit plaintiff sustained.

A former trial in the MOORE case resulted in verdict for plaintiff for \$2,000, but the same was reversed by the Supreme Court on the ground that plaintiff had failed to show that he used all reasonable precaution to avoid the collision. See *MOORE v. CENTRAL R. R. Co.*, 4 Zab. (24 N. J. L.) 268 (February Term, 1854).

**COLLISION AT CROSSING — CONTRIBUTORY NEGLIGENCE.** — In *RUNYON v. CENTRAL R. R. CO. OF NEW JERSEY*, 1 Dutcher (25 N. J. L.) 556 (1856), action for damages occasioned by collision with train while plaintiff was driving across defendant's railroad track, it was *held* that if by the exercise of ordinary care the plaintiff could have avoided the injury, or if his conduct contributed to produce it, he cannot recover. *Held*, also,

that if after the court has given its opinion that the plaintiff ought to suffer a nonsuit, the plaintiff does not insist on going to the jury, he is considered as suffering a voluntary nonsuit. Nonsuit sustained.

**TRAIN COLLIDING WITH WAGON AT CROSSING — CONTRIBUTORY NEGLIGENCE.** — In **MORRIS AND ESSEX R. R. CO. v. HASLAN ET AL. ADM'RS**, 4 Vr. (33 N. J. L.) 147 (1868), verdict for plaintiffs for \$2,000 damages for death of intestate killed in collision at crossing, verdict was set aside and new trial ordered, it being held that "a person driving a heavy team, on a foggy morning, over a railroad, without waiting to ascertain whether an approaching train was near, having been struck by the engine and killed, contributed to the act by his own negligence." (Citing *Runyon v. Central R. R. Co.*, 1 Dutcher, 558; *Telfer v. Northern R. R. Co.*, 1 Vroom, 188.)

**COLLISION AT CROSSING — BACKING TEAM — NEGLIGENCE FOR JURY.** — In **BONNELL v. DELAWARE, LACKAWANNA AND WESTERN R. R. CO.**, 10 Vr. (39 N. J. L.) 189 (1877), collision between wagon and train at crossing, judgment for plaintiff for \$3,980 was affirmed. It was held that "where there are doubtful and qualifying circumstances, the question of negligence or want of proper care must be left to the jury." The syllabus to the *BONNELL* case states: "Where a person, as he approaches a railroad crossing, with a single track and infrequent trains, sees a train with the rear towards him going, apparently, in an opposite direction, and is deceived by appearances, and his attention distracted by the actions of persons at a distance attempting to warn him of his danger from the train which is backing rapidly and quietly towards him, and a wagon has crossed just before him, it will be left to the jury to say whether there is want of proper care."

## NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY v. STEINBRENNER.

*Court of Errors and Appeals, New Jersey, March Term, 1885.*

[Reported in 18 Vr. (47 N. J. L.) 161.]

**DRIVING ACROSS TRACK AND TRAIN COLLIDING WITH VEHICLE — PERSON RIDING IN VEHICLE INJURED — IMPUTED NEGLIGENCE.** — 1. A. hired a coach and horses, with a driver from B., to take his family on a particular journey. In the course of the journey, in crossing the track of a railroad, the coach was struck by a passing train and A.

was injured. In an action by A. against the railroad company for damages, it was held that the relation of master and servant did not exist between the plaintiff and the driver, and that the negligence of the driver, co-operating with that of the persons in charge of the train which caused the accident, was not imputable to the plaintiff as contributory negligence to bar his action.

2. A passenger in a hired coach may, by words or conduct at the time, so sanction or encourage a special act of rash or careless driving as to commit an act of negligence which will debar him from a suit against a third person for an injury resulting from the co-operating negligence of both parties. But for whatever purpose the negligence is invoked — whether as a cause of action for injury done by the driver, or as contributory negligence to bar an action by the passenger against a third person for an injury sustained — the negligence, to be imputed to the passenger, must be such as arises in some manner from his own conduct. The negligence of the driver, without some co-operating negligence on his part, cannot be imputed to the passenger in virtue of the simple act of hiring (1).
3. *Thorogood v. Bryan*, 8 C. B. 115, *disapproved* (2).  
(Official syllabus to the Report.)

ON ERROR to the Supreme Court. *Judgment for plaintiff below affirmed.*

"Steinbrenner, the plaintiff below, sued to recover damages for personal injuries received in a collision with a train of the defendant at the crossing of a public road over the defendant's track. The plaintiff was riding, with his four nieces, in a coach owned by one Merkins, and driven by a driver who was employed by Merkins. The coach, horses and driver were hired by the plaintiffs of Merkins for the journey in the course of which the collision occurred. Among the defenses made at the trial was that of contributory negligence. To the rulings of the trial judge on that subject exceptions were taken by the defendant, which were brought up by this writ of error."

C. PARKER, for plaintiff in error.

VREDENBURGH & GARRETSON, for defendant in error.

**Depue, J.** — The exception taken to the refusal to nonsuit

1. The STEINBRENNER case is a leading New Jersey authority on the subject of Imputed Negligence, and is much cited in other jurisdictions on that topic. The subject is thoroughly discussed in the case at bar and the ruling in the English case of *Thorogood v. Bryan*, 8 C. B. 115, is disapproved, many authorities being reviewed, the English cases cited therein being covered in the note, in 11 AM. NEG. CAS. 145-146, on repudiation of the doctrine of *Thorogood v. Bryan*, and also in the note on Imputed Negligence, in 11 AM. NEG. CAS. 151-156.
2. See discussion on the doctrine enunciated in *Thorogood v. Bryan*, 8 C. B. 115, which doctrine has been repudiated by the English courts.

presents the same questions that are raised by the exceptions to the charge and the refusals to charge. The defendant's counsel requested the court to instruct the jury that there was negligence on the part both of the plaintiff and of the driver of the coach, contributing to the accident, which would preclude the plaintiff from a recovery. The judge charged that if the plaintiff himself was negligent, and his negligence contributed to the injury, there could be no recovery. He refused to charge, as a question of law, that there was such contributory negligence on the plaintiff's part apparent in the case as would prevent the plaintiff from maintaining his action. This ruling was correct; for, where it is a fairly debatable question, upon the evidence, whether there was negligence in the plaintiff which contributed to the injury, the question is one for the jury. The court cannot decide that proposition as a question of law unless the plaintiff's contributory negligence clearly appears. *Penn. R. R. Co. v. Matthews*, 7 Vroom, 531; *Del. & W. R. R. Co. v. Toffey*, 9 Vroom, 525; *Penn. R. R. Co. v. Righter*, 13 Vroom, 180 (1). The testimony on that subject was not such that the judge could say that there was contributory negligence, as a legal inference from undisputed facts.

The judge also refused to charge that the negligence of the driver of the coach was imputable to the plaintiff, and did not submit the question of the driver's negligence to the jury. This judicial action was based upon the theory that the driver was neither the servant of the plaintiff, nor was the latter in law so identified with the driver that the driver's negligence would prevent the plaintiff's recovering for injuries received from the defendant's negligence.

It is clear that the plaintiff and the driver of the coach did not hold to each other the relation of master and servant. *Quarman v. Burnett*, 6 M. & W. 499, is directly upon that point. This subject came before the English courts in the earlier case of *Laugher v. Pointer*, 5 B. & C. 547. In that case the owner of a carriage, having occasion to use it, hired of a stable-keeper a pair of horses to draw it, the stable-keeper furnishing the driver. The driver, by negligent conduct in driving the carriage, ran against and injured a horse belonging to a third person. The latter sued the owner of the carriage for the injury. At the trial

1. These cases are reported with the New Jersey cases in this volume of *AM. NEG. CAS.*

Abbott, C. J., nonsuited the plaintiff, and the nonsuit was sustained in *banc* by an equally divided court, Abbott, C. J., and Littledale, J., holding the nonsuit to be right; Baily and Holroyd, JJ., dissenting.

In *Laugher v. Pointer*, *supra*, all the judges agreed that the defendant's liability for the negligent acts of the driver could arise only from the relation of master and servant, and the dissenting judges placed their opinions on the ground that the defendant had assumed that relation. Finally the question was set at rest by *Quarman v. Burnett*, *supra*. In that case the defendants kept a carriage and were accustomed to hire horses and a coachman of a job mistress for a day or a drive, for which the job mistress charged and received a certain sum. The defendants generally had the same horses and always the same coachman. The coachman was regularly in the employ of the job mistress, and received from her regular weekly wages. The defendants paid him two shillings for each drive, as a gratuity, and had provided a livery hat and a coachman's coat, which he wore when driving for them, and took off on his return to the defendant's house, where the hat and coat were hung up in the passage. He had driven the defendants out one day, and on his return, after the defendants alighted from the carriage, he left the horses and carriage unattended, to go into the defendant's house to leave the livery hat. The horses set off whilst the driver was so occupied, and ran against the plaintiff's chaise, threw him out and seriously injured him, and damaged the chaise. In a suit against the owners of the carriage for these injuries the plaintiff had a verdict, which was set aside for the reason that the driver was not the servant of the defendants, but was the servant of the job mistress, and that the latter alone was responsible for his negligent acts.

*Quarman v. Burnett*, *supra*, was decided very much upon the reasoning of Abbott, Ch. J., and Littledale, J., in *Laugher v. Pointer*, *supra*, and has been regarded as settling the law in the English courts, that the hiring of horses to be driven by a driver regularly in the employ of the person from whom the horses are hired does not create the relation of master and servant between the hirer and the driver, from which a liability for the driver's negligence would arise. In the latest case in the English courts in which the subject was considered *Quarman v. Burnett*, *supra*, was approved and followed. *Jones v. Corporation of Liverpool*, 14 Q. B. Div. 890.



But it is contended by the plaintiff in error that although the hiring of a coach and driver for a journey would not create the relation of master and servant so as to make the hirer responsible to third persons in an action for an injury caused by the negligent conduct of the driver, yet the hirer of the coach is so identified with the driver in the prosecution of the journey that the latter's negligence will be imputed to the hirer as contributory negligence to bar him from the right of suit against third persons for injuries sustained by their negligence. To maintain this contention *Thorogood v. Bryan*, 8 C. B. 115, is relied on (1).

In *Thorogood v. Bryan*, *supra*, the deceased, for causing whose death the suit was brought, was a passenger in an omnibus owned by one B. The defendant was the owner of another omnibus running on the same line. The deceased, while alighting from the omnibus in which he was a passenger, was knocked down by the defendant's omnibus, and received injuries from which his death ensued. The court sustained an instruction to the jury that if the want of care on the part of the driver of the omnibus in which the deceased was a passenger, in not drawing up to the curb to put the deceased down, had been conducive to the injury, the plaintiff could not recover, although the defendant's driver had been guilty of negligence. The grounds of this decision appear in the opinions of Justices Coltman and Maule. Coltman, J., said "that having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants that if any injury results from their negligence he must be considered a party to it." Maule, J., expressed the same idea in this language: "On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance; he enters into a contract with the owner, whom, by his servant the driver, he employs to drive him; if he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it. As regards the present defendant, he is not altogether without fault. He chose his own conveyance and must take the consequences of any default of the driver whom he thought fit to trust."

It will be observed from the reasoning of the judges in *Thorogood v. Bryan*, *supra*, that the decision was not placed upon the

1. *Thorogood v. Bryan*, 8 C. B. 115, is discussed in note, in 11 AM. NEG. CAS. 145-146.

control the passenger had or might have had over the driver's conduct in driving the omnibus, but was rested upon his selection of the vehicle in which he chose to ride; and the decision applies as well to passengers in public conveyances, where interference with the driver's management of his team, if not resented, would likely be futile, and passengers in railroad trains, where the passenger is absolutely without power to control the running of the trains, as to a passenger by a private conveyance hired for a special occasion. The Court of Exchequer, in the only case I have found in the English courts in which *Thorogood v. Bryan, supra*, was applied, gave effect to the doctrine of that case as against a passenger on a railway train who was injured in a collision between trains of different companies through the negligence of the drivers of both trains. *Armstrong v. Lancashire & Yorkshire R. R. Co.*, L. R. 10 Exch. 47.

*Thorogood v. Bryan, supra*, has been directly repudiated in the English Court of Admiralty, *The Milan*, Lush. Adm. 388, 31 L. J. (P. M. & A.) 105; *Chartered Mercantile Bank v. Netherlands, &c.*, Navigation Co., 9 Q. B. Div. 118; S. C., *on appeal*, 10 Q. B. Div. 521, 545, and is generally cited in the common-law courts simply as a case that has not been overruled. It was so cited in *Armstrong v. Lancashire & Yorkshire R. R. Co., supra*, and although both the barons disclaimed any dissatisfaction with the case, Pollock, B., made the observation that "the only difficulty in it arises from the use of the word 'identified' in the judgment. If it is to be taken that by the word 'identified' is meant that the plaintiff, by some conduct of his own, as by selecting the omnibus in which he was traveling, has acted so as to make the driver his agent, this would sound like a strange proposition, which could not be entirely sustained. What I understand it to mean is that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus, or the driver." This comment of the learned baron seems to me to be hostile to the reasoning in *Thorogood v. Bryan, supra*, for that decision was placed expressly on the ground that by selecting the conveyance the passenger had so identified himself with the driver that he must be considered a party to the driver's negligence — a legal sequence that could arise only from the identification being such as that *quo ad hoc* the driver became the agent of the passenger; for the contributory negligence which shall defeat the action must in some sense

be the act of the party injured. *Paulmier v. Erie R. R. Co.*, 5 Vroom, 151. The substitution of the words "in the same position" for "identified" implies that the theory of the doctrine is that a person doing a lawful act may, without any fault on his part, either personally or imputable to him as being the act of his agent, be placed in a position in which he will be debarred from recovering for an injury received from the wrongful act of a third person — a proposition wholly at variance with legal principles. A party may, by his act, be in the position in which he receives an injury, and yet not be deprived of his right of suit against a wrongdoer. A person sustaining an injury from the negligence of another is precluded from his action on the ground of contributory negligence only where there has been some fault on his part which was the proximate cause of the injury. "Nothing will preclude him from recovering but such conduct as puts him in the wrong." 2 *Thomp. on Neg.* 1154; *N. J. Express Co. v. Nichols*, 4 Vroom, 435, 439 (1).

Tested either by the reasoning of the judges by whom *Thorogood v. Bryan*, *supra*, was decided, or by the explanation of Baron Pollock in *Armstrong v. Lancashire & Yorkshire R. R. Co.*, *supra*, the doctrine of that case is equally untenable. The decision has not escaped criticism, nor has it passed in the English common-law courts without indications of distrust, if not disapproval. It was cited by counsel in *Waite v. N. E. R. R. Co.*, E. B. & E. 719, and both in the Queen's Bench and in the Exchequer Chamber the court declined to express any opinion upon it, and decided the case on other grounds. It was criticised and strongly condemned by Messrs. Keating and Wiles (afterwards judges of the Court of Common Pleas), in the notes of *Ashby v. White*, 1 Sm. Lead. Cas. (342) 505, and the criticism has been referred to by English judges, if not with approval, at least without expression of dissent therefrom. *Taff v. Warman*, 2 C. B. (N. S.) 750; *Waite v. N. E. R. R. Co.*, E. B. & E. 728; *Spaight v. Tedcastle*, 6 App. Cas. 217. And this criticism is placed by Mr. Addison in the text of his work on Torts, Add. Torts, 374. Mr. Bigelow concludes a review of the cases, including *Thorogood v. Bryan*, *supra*, with the expression of his opinion that "the only case where the so-called doctrine of identification or imputation can be applied is where the passenger

1. The *NICHOLS* case is reported with the New Jersey cases in this volume of *AM. NEG. CAS.*, page 243, *ante*.

actually participates in the carrier's fault, as by urging him on or by plainly manifesting approval of his course, and thus encouraging it." Big. Lead. Cas. 726-729 (1).

Thorogood *v.* Bryan, *supra*, has met both with approval and disapproval in the courts of this country. It was expressly repudiated by the Supreme Court of this State in Bennett *v.* N. J. R. R. Co., 7 Vroom, 225. In that case a passenger in a horse car, who was injured by a collision between a train of the defendant and the horse car, sued the railroad company, and it was held that the driver of the horse car was not the agent of the passenger so as to render the passenger chargeable with the negligence of the driver. The Chief Justice, in delivering the opinion of the court, commenting on Thorogood *v.* Bryan, said: "This case stands, I think, in point of principle, alone in the line of English decisions, and the grounds upon which it rests seem to me inconsistent with legal rules. The reason given for the judgment is that the passenger in the omnibus 'must be considered as identified with the driver of the omnibus in which he voluntarily becomes a passenger,' and that the negligence of the driver is the negligence of the passenger; but I have entirely failed to perceive how it is that the passenger in a public conveyance becomes identified in any legal sense with the driver of such conveyance. Such identification could result only in one way—that is, by considering such driver the servant of the passenger. I can see no ground upon which a relationship is to be founded." The Chief Justice adds: "It is obvious that in a suit against the proprietor of the car in which he was a passenger there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger. \* \* \* The doctrine of the English case appears to convert the driver of the omnibus into the servant of the passenger for the single purpose of preventing the passenger from bringing a suit against a third party whose negligence has co-operated with that of the driver in the production of the injury. I am compelled to dissent from such a proposition."

Callahan *v.* Sharp, 27 Hun, 85, was also cited as a case in point adverse to the ruling of the court below. In that case the suit was brought on the statute to recover damages for causing the

1. The English cases cited in the and it is not necessary to append ab-  
opinion in the case at bar are suffi- stracts of such cases. See notes in 11  
ciently discussed by the learned judge, AM. NEG. CAS. 145-146 and 151-156.

death of a child thirteen years old. The facts were that the mother of the child hired a coach and driver from a livery stable to carry her and her children to a funeral. The coach, in crossing the defendant's railroad, came in collision with a passing train, causing the death of one of the children. It was held by Dykeman and Gilbert, JJ. (Barnard, P. J., dissenting), that as the driver of the coach was subject to the control and commands of the mother, his negligence was imputable to her, and that as the mother and children were engaged in a joint enterprise, in which she acted for herself and them, the negligence so imputed to her might be attributed to deceased, and prevented a recovery by his representatives. But it appears from a note in Abbott's Ann. Dig., for 1883-84, pp. 94, 344, that the suit was tried a second time on the theory of the reversing opinion in 27 Hun, and that the judgment in the second suit upon the same facts was in turn reversed by the same court (Cullen, J., and Barnard, P. J., concurring, and Dykeman, J., dissenting), on the ground that the deceased was not chargeable with the driver's negligence because the driver was the employee of the stable-keeper, and not under the mother's control in the management of the team, and because, if it were otherwise, the deceased, being an infant of tender years, was *sui juris*. On appeal, this last decision was affirmed by the Court of Appeals without an opinion. Callahan v. Sharp, 95 N. Y. 672. The final result in this case seems to be adverse to the contention of the plaintiff in error, and prior decisions of the same court are to the same effect. Chapman v. N. H. R. R. Co., 19 N. Y. 341 (9 Am. Neg. Cas. 618 n); Colegrove v. N. Y. & H. R. R. Co., 20 N. Y. 492 (9 Am. Neg. Cas. 618 n); Webster v. H. R. R. Co., 38 N. Y. 260 (9 Am. Neg. Cas. 618 n); Robinson v. N. Y. C. R. R. Co., 66 N. Y. 11.

In the principle which governs in this respect there is no distinction between a public conveyance in which a passenger takes passage and a coach hired by him from a livery for a particular journey; nor is the situation changed by the fact that the negligence of the driver is invoked as contributory negligence to exclude the passenger from his action against a third person for an injury resulting from the negligence of both parties. As the Chief Justice points out in his opinion in Bennett v. N. J. R. R. Co., *supra*, the identification of the passenger with the driver for the purpose of fixing on the former responsibility for the latter's act, can result only from considering the driver as the servant of

the passenger; and the driver cannot be converted into his servant for the single purpose of preventing the passenger from bringing suit against a third party whose negligence has co-operated with that of the driver in the production of the injury. The identification must be so complete that the passenger would not only be debarred from a suit against the proprietor of the coach for the driver's negligence in the particular instance, but would also be responsible to third persons for injuries sustained by the carelessness of the driver in the course of the journey. *Quarman v. Burnett*, *supra*, and kindred cases show that the relation of master and servant is not created by such a hiring, and that such a responsibility does not arise from an employment under it. "There may," as was said by Baron Parke in *Quarman v. Burnett*, *supra*, "be special circumstances which may render the hirer of horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner which occasions the damage complained of, or to absent himself at one particular moment, and the like." *McLaughlin v. Pryor*, 4 M. & G. 48; S. C., 1 Car. & M. 354, is a precedent of an action successfully prosecuted against the hirer of a carriage and horses for a trespass committed, by the driver, who was the servant of the man who let the carriage — the defendant's liability for the driver's act being enforced on the ground that he sat upon the box and countenanced, encouraged and assented to the driver's act, and made the latter's negligent act his own. It may also be that a passenger in a hired coach may, by words or conduct at the time, so sanction or encourage a special act of rash or careless driving as to commit an act of negligence which will debar him from a suit against a third person for an injury resulting from the co-operating negligence of both parties. But for whatever purpose the negligence is invoked, whether as a cause of action for an injury done by the driver, or as contributing negligence to bar an action by the passenger against a third person for an injury sustained, the negligence to be imputed to the passenger must be such as arises in some manner from his own conduct. The negligence of the driver, without some co-operating negligence on his part, cannot be imputed to the passenger in virtue of the simple act of hiring. If the law were otherwise, not only the hirer of the coach, but

also all the passengers in it, would be under a constraint to mount the box and superintend his conduct, the conduct of the driver, in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be, from a coach-stand, for the consequences of any injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that, too, though the passenger were ignorant of the character of the driver, and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried.

In this case there were no special circumstances which would make the driver's negligent act the act of the plaintiff. The plaintiff hired the coach to carry himself and four nieces to a particular place. The journey was along a public road not specially dangerous, except in the fact that it crossed the defendant's railroad. The coach was an ordinary closed coach with two seats inside and a driver's box in front, and a window on each side. The plaintiff and two of his nieces occupied the back seat. The plaintiff testified that he told the driver before starting to be careful about crossing the railroad; that the driver slackened up as he approached the crossing; that he (the plaintiff) listened all the time, and made it his particular business to look and see whether any train was coming; that he did not hear any whistle or bell or the approaching train, and was not aware of the approach of the train until it was right upon them. If the driver was negligent in venturing upon the track, the plaintiff neither encouraged his negligent act nor did he contribute to it by any negligence of his own. The judge's refusal to charge that the driver's negligence was imputable to the plaintiff was correct.

The judgment should be affirmed.

*For affirmance:* THE CHANCELLOR, CHIEF JUSTICE, DEPUE, DIXON, MAGIE, REED, SCUDDER, VAN SYCKEL, BROWN, CLEMENT, COLE, PATERSON, WHITAKER; *for reversal:* None.

**COLLISION BETWEEN WAGON AND TRAIN AT CROSSING — DUTY OF RAILROAD COMPANY AS TO SIGNALS AT CROSSING.** — In NEW YORK, LAKE ERIE AND WESTERN R'Y CO. v. RANDEL, 47 N. J. L. (18 Vr.) 144 (1885), collision at crossing, plaintiff being injured while driving across track, judgment

for plaintiff was affirmed. The syllabus to the report states the case as follows:

"1. Where a railroad company has created extra danger, it is bound to use extra precautions; and if the track is put in a position where the trains, when close to their transit over a public street or road, cannot be seen, that is an extra danger calling for more than ordinary cautionary signals.

"2. It was not error in the court, in such a case, to refuse to charge that under the circumstances the company had discharged its whole duty to those of the public who had occasion to use the track at that place, by merely ringing the bell at the crossing.

"Where a traveler was crossing, in a wagon, the tracks of a railroad in a place of extra danger, and the flagman did not notify him of the coming of the train until after he had begun to cross the tracks, and the traveler then misunderstood the warning and went forward when he ought to have retreated: *Held*, that such misunderstanding should not, under the circumstances, be imputed to him as negligence."

## BERRY v. PENNSYLVANIA RAILROAD COMPANY

*Court of Errors and Appeals, New Jersey, March Term, 1886.*

[Reported in 19 Vr. (48 N. J. L.) 141.]

TRAIN COLLIDING WITH WAGON AT CROSSING — DUTY OF TRAVELER AT CROSSING — CONTRIBUTORY NEGLIGENCE NOT EXCUSED BY ABSENCE OF FLAGMAN. — 1. A person about to cross a railroad track is charged with the duty of looking and listening for the approach of trains.

2. He is also charged with the duty of looking for a flagman and obeying the signals he gives, if given in time to avoid collision.
3. Where he knows that a flagman is habitually stationed at a crossing, and upon looking finds that the flagman is not at his post, giving signal of danger, he has a right to presume that a train is not about to pass.
4. But absence or negligence of a flagman will not excuse the traveler about to cross the track from looking both ways and listening (1).
5. If, at the close of plaintiff's evidence, it clearly appears that he has failed in the duties above stated, or in either of them, and contributed in any degree to the accident, he should be nonsuited.
6. But if some negligence on part of the plaintiff does not clearly appear, the question should go to the jury.
7. In this case it does not appear that there was any carelessness on part of plaintiff.

(*Official syllabus to the Report.*)

1. See also Penn. R. R. Co. v. Righter, 42 N. J. L. 180, 12 N. J. Cas. 249, ante.



ON ERROR to the Supreme Court. The facts are stated in the opinion. *Judgment of nonsuit reversed.*

R. V. LINDABURY, for plaintiff in error.

M. BEASELEY, Jr., for defendants in error.

**Parker, J.** — At the trial of this cause the plaintiff was nonsuited, because at the close of his evidence the court was of opinion that contributory negligence had been proved.

The accident occurred in the forenoon of the 2d day of October, 1883, at a crossing in the city of Elizabeth. It was a rainy morning. The train which caused the injury complained of was running at a rapid rate of speed. There were numerous obstructions to the view near the track of defendant's railroad. The foliage on the trees was at the time very dense. The crossing was a dangerous one. A flagman had been stationed there by the defendants. The plaintiff had a right to cross the railroad at that place if, in so doing, he exercised care to avoid collision with trains of the company. By law the plaintiff was charged with the duty of looking and listening before he attempted to cross. He was also charged with the duty of observing and giving heed to signals of the flagman, if any were made in time to avoid accident. If he failed in these duties, or either of them, and by such failure contributed to the accident in any degree, he should have been nonsuited; for although contributory negligence is matter of defense, yet if it clearly appear at the close of the plaintiff's evidence, the court should nonsuit. Carelessness on the part of one crossing a railroad track may result not only in injury to himself, but may also be the means of maiming or killing many travelers, and therefore the courts must hold the law strictly against him who is proved to have been careless. Is there such proof in this case, is the question.

The plaintiff swears that before he attempted to cross the railroad he stopped his horse nine or ten feet from the track, looked both ways and listened, but neither saw nor heard a train approaching. He was seated in the front part of a wagon, with the front curtains up. He also says that when he looked he saw as far on the track as the obstructions to the view would permit, but did not see any train approaching, nor heard the sound of bell or whistle. There is no evidence to show that these statutory signals were given.

The plaintiff had frequently passed over that crossing and knew that a flagman was habitually stationed there. He had a

right to presume that if a train was about to pass, the flagman would be at the crossing giving the customary signals of danger.

The plaintiff swears that before he attempted to go over the track he had full view of the crossing; that he looked to see if the flagman was there, and that no flagman was in sight; that not seeing a flagman, he started to drive across the railroad; that when his horse had gotten on the first main track, he for the first time saw the flagman running towards him, with an umbrella raised in one hand and a flag, not unfurled, in the other; that the flagman did not wave the flag, but ran up to the horse and struck, or motioned to strike his head with the umbrella or flag, which action he says stopped or checked the horse; that at this juncture he, for the first time, saw the locomotive of an approaching train within a few feet of him, and that he whipped the horse to get out of the way of the train, but was so delayed by the action of the flagman before stated that he could not prevent the collision. The locomotive struck the hind wheel of the wagon, by means of which the plaintiff was thrown out and injured.

The plaintiff also swears that when he first saw the flagman he was in such a position as to make it impossible to turn or back the horse so as to escape.

The testimony of the other witnesses who were present at the time of the accident fully corroborates the statements of the plaintiff as to all material facts. James Styles says he saw the flagman running from near the flag-house, and at that time the horse and wagon were on the track. The flagman had something in his hand, not unfurled, with which he struck, or made a pass at the head of the horse, which checked him, and, as the flagman stopped the horse, the engine struck the hind part of the wagon. Alexander Dick, another witness, says that he saw the flagman in the act of approaching plaintiff with an umbrella raised in one hand, and a flag in the other, and at that time the feet of the horse were on the track; that the flagman made passes at the horse, which caused him to delay. This witness also says that he had a full view of the crossing, and did not see the flagman there until he saw him run at the horse when the horse was on the track. Joseph J. Ogden, another witness, also saw the accident, and he says that the plaintiff, before he undertook to cross the track, stopped and looked, and at that time there was no flagman visible at the crossing; that he saw the flagman run out when the plaintiff was just starting on the crossing; that then

the horse was right over the rails, and part of the wagon on the track. This witness further says that the flagman stopped the horse so that he could not get over in time, and that the horse was on the first main track when the flagman started from the flag-house. John Irving swears that he saw the plaintiff stop before driving on the track two or three yards back. He says that at that time he had a view of the crossing, and the flagman was not there. He says further that he saw plaintiff start to go across the track, and afterwards he saw the flagman start out of the flag-house towards the horse, with an umbrella in one hand and a flag in the other, and that the horse was then on the first main track, and the wagon on the switch track, and that when the flagman came up the horse came to a standstill.

From the testimony it is clear that the flagman was not on the crossing giving the customary signal of danger when the plaintiff approached the line of the track; that the plaintiff, when within a few feet of the track, stopped and looked both ways and listened; that the flagman did not start from the flag-house until plaintiff's horse had gotten on the first track; that he did not then give the customary signal with the unfurled flag, and that the flagman who, without warning, allowed the plaintiff to drive on the track, so far as not to be able to turn or back with safety, then checked the horse to such extent as to prevent escape from the collision.

I am at a loss to see that the plaintiff, in attempting to cross the track, under such circumstances, was guilty of any negligence whatever. It is true that negligence of a flagman will not excuse the traveler who attempts to cross the track of a railroad from looking both ways and listening. He must not rely entirely on the flagman. In this case it is proved that the plaintiff did look and listen. He not only looked for the flagman at the crossing, but he stopped his horse and looked up and down the track before he undertook to drive over.

It may be said that plaintiff could have seen the train approaching before he drove on the track if he had looked, and if he did not see the train he is chargeable with not looking. The plaintiff swears that he did look, and did not see the train until it was almost upon him. Is there evidence to show that the plaintiff's testimony in this respect is not true? It is shown that at considerable distance from the crossing a person approaching the railroad where the plaintiff was driving, if he looks towards

Newark, may see the track for several hundred feet. But at that point the train would not be near enough for plaintiff to see it, judging from the speed it was going. After passing that point of observation, the obstructions along the track prevent a view of the train until almost on the crossing. About nine or ten feet from the track there is a space among the branches of the trees about eighteen inches long, where a view of a part of the track can be had when the leaves are off, or partially off, the trees. The observations of all the witnesses (except the plaintiff) who testify on that subject were made when the trees were not clothed with dense foliage. No one swears that an approaching train could be seen through that opening on the 2d day of October, 1883. The plaintiff swears that on that day, before he drove on the track, he stopped and looked at that place and did not see the train. At that season of the year the foliage is luxuriant. It was raining, and the leaves and branches must have drooped somewhat. At all events, the only witness who speaks of obstructions to the vision at that point on that day swears he could not see the train. The conclusion from his evidence is that the opening, sometimes eighteen inches long, was, on the 2d of October, 1883, closed so as to obstruct the vision.

Upon the facts proved in this cause the case should not have been taken from the jury. The plaintiff took every precaution to prevent accident that a careful man would take when about to cross a railroad.

It certainly is not clear that the plaintiff was in the least degree careless, and where some contributory negligence does not clearly appear, that question should go to the jury.

The judgment of nonsuit is reversed.

*For affirmance:* THE CHIEF JUSTICE, KNAPP, MAGIE, CLEMENT, PATERSON, WHITAKER, 6; *for reversal:* THE CHANCELLOR, PARKER, REED, SCUDDER, BROWN, COLE, MCGREGOR, 7.

**COLLISION AT CROSSING — CONTRIBUTORY NEGLIGENCE — NONSUIT.** — In *MERKLE, Adm'x, v. NEW YORK, LAKE ERIE AND WESTERN R. R. CO., and SCHWINGE v. NEW YORK, LAKE ERIE AND WESTERN R. R. CO.*, 49 N. J. L. (20 Vr.) 473 (1887), one of the actions being for death of person who, while driving wagon, was killed in collision, and the other action being for damages to wagon caused by collision with train at

crossing, judgment of nonsuit in both cases was affirmed. The case is stated in the syllabus to the report as follows: "A., driving a covered wagon in which there were boxes containing a large number of loose bottles, which rattled with the motion of the wagon, in attempting to cross a railroad track upon which he could not see an approaching train until he came within six or eight feet of the track, was killed. *Held*, that he was guilty of contributory negligence; inasmuch as he could not see an approaching train any considerable distance from the track, ordinary prudence required him to stop the noise of his wagon when he was near enough to the railroad to ascertain by listening whether there was any danger or not."

**COLLISION BETWEEN WAGON AND STREET CAR.** — In **NORTH HUDSON COUNTY R'Y CO. v. ISLEY**, 49 N. J. L. (20 Vr.) 468 (1887), collision between wagon and street car, judgment for plaintiff was affirmed. It was held that "when a horse car is passing on its track in a public highway, it is the duty of the driver of any vehicle to remove such vehicle from the track in time to give free passage to the car. When the driver should begin to turn his vehicle from the track must depend on the circumstances, on which the driver must exercise a reasonable judgment and do what a prudent man, diligent to give free passage to the car, would do."

In the action by **ISLEY and WIFE** against the same defendant the same points were presented, and judgment for plaintiffs affirmed, as in preceding paragraph. **NORTH HUDSON COUNTY R'Y Co. v. ISLEY**, 49 N. J. L. (20 Vr.) 470.

#### COLLISIONS BETWEEN VEHICLES AND TRAINS AND STREET CARS

##### *Vehicle damaged in collision.*

**DELAWARE, LACKAWANNA AND WESTERN R. R. Co. v. SHELTON**, 55 N. J. L. (26 Vr.) 342 (1893), collision between train and vehicle at street crossing; vehicle damaged; judgment for plaintiff affirmed.

##### *Collision at crossing — Contributory negligence.*

**PENNSYLVANIA R. R. Co. v. GOODENOUGH**, 55 N. J. L. (26 Vr.) 577 (1893), collision at crossing, where wife was injured while driving with husband; *held*, that contributory negligence of husband defeats recovery in action for injury to wife; judgment for plaintiff reversed.

See also **GOODENOUGH v. PENNSYLVANIA R. R. Co.**, 55 N. J. L. (26 Vr.) 596 (1893); action by husband for injuries to himself; error to nonsuit.

*Train colliding with vehicle — Person driving killed.*

PENNSYLVANIA R. R. Co. v. MIDDLETON, ADM'R, 57 N. J. L. (28 Vr.) 154 (1894), collision between wagon and train at crossing and person driving killed; motion to nonsuit properly refused.

*Collision at crossing — Failure to look and listen.*

PENNSYLVANIA R. R. Co. v. LEARY, 56 N. J. L. (27 Vr.) 705 (1894), collision between train and wagon at crossing; failure to look and listen; contributory negligence; judgment for plaintiff reversed.

*Collision between fire truck and street car.*

CONSOLIDATED TRACTION CO. v. CHENOWITH, 58 N. J. L. (29 Vr.) 416 (1896), collision between fire truck and street car and driver of truck injured; judgment for plaintiff affirmed.

*Vehicle damaged in collision with street car.*

CONSOLIDATED TRACTION CO. v. REEVES, 58 N. J. L. (29 Vr.) 573 (1896), collision between street car and vehicle; verdict in Hudson Common Pleas for plaintiff for damages to his horse and wagon; affirmed.

*Collision between wagon and street car.*

CONSOLIDATED TRACTION CO. v. LAMBERTSON, 59 N. J. L. (30 Vr.) 297 (1896), collision between wagon and street car; judgment for plaintiff affirmed.

NEW JERSEY ELECTRIC R'y Co. v. MILLER, 59 N. J. L. (30 Vr.) 423 (1896), collision between wagon and trolley car; judgment for plaintiff reversed for erroneous instruction as to right of way of vehicle.

*Collisions and crossings.* See also the following New Jersey cases: N. Y., L. E. & W. R. R. Co. v. Leaman, 25 Vr. (54 N. J. L.) 202; Hackett v. N. Y., L. E. & W. R. R. Co., 29 Vr. (58 N. J. L.) 4; Consolidated Traction Co. v. Haight, 30 Vr. (59 N. J. L.) 577; Hamilton v. Del., L. & W. R. R. Co., 21 Vr. 263; Blaker v. Rec'r of N. J. Midland R'y Co., 3 Stew. 240; Palys v. Erie R'y Co., 3 Stew. 604, 5 Stew. 302.

**COLLISION AT CROSSING — CHILDREN KILLED — EXCESSIVE DAMAGES.** — In TELFER, ADM'R, v. NORTHERN RAILROAD CO., 1 Vr. (30 N. J. L.) 188 (1862), an action for damages for death of plaintiff's son, fifteen years old, who, while crossing defendant's track in a wagon at a crossing was struck and killed by a train, and another action brought at same time for death of another son thirteen years old, caused by the same action, it

appeared that the two actions were tried together at the Hudson Circuit, and verdict rendered for plaintiff in both cases, damages being assessed at \$936 and \$1,056 respectively. On defendant's motion to show cause why verdicts should not be set aside the Supreme Court set the same aside on ground of excessive damages.

The ruling in the TELFER case (as per syllabus to the report) is as follows:

"1. When a railroad company is sued for damages sustained by a collision on their road, induced by the negligence of the company or their agents, and it appears that the party injured was himself guilty of such negligence or want of reasonable care as contributed to the doing of the injury, there can be no recovery.

"2. In crossing ordinary roads caution and care are chiefly demanded to avoid running against or over anybody else; in crossing railroads it is exacted to avoid being run over yourself. In the former case the blame attaches *prima facie* to the party doing the injury; in the latter it attaches, in the first instance, to the party obstructing the track. (*Per VAN DYKE, J.*)

"3. In an action under the statutes to recover damages for death caused by negligence, only the pecuniary loss or injury sustained by the plaintiff can be allowed; and in estimating that the chances of health and life are to be considered in connection with the value of services.

In the TELFER case, *supra*, the reciprocal duties of railway companies and persons crossing their roads are fully discussed. The New Jersey cases cited in the opinions are *Moore v. Central R. R. Co.*, 4 Zab. 268, 853; *Runyon v. Central R. R. Co.*, 1 Dutcher, 556, which cases are reported with the New Jersey cases in this volume of AM. NEG. CAS.

## NEW JERSEY R. R. AND TRANSPORTATION COMPANY v. WEST (1).

*Supreme Court, New Jersey, November Term, 1866.*

[Reported in 3 Vr. (32 N. J. L.) 91.]

BOY STRUCK BY TRAIN WHILE CROSSING TRACK — GROSS NEGLIGENCE. — 1. The passage of two trains in opposite directions, along contiguous tracks, in a populous city, so as to meet at or near a crossing properly used by foot passengers, without the presence of a flagman, and without lessening their speed, held to justify a jury in determining that

1. See the WEST case, in the Court of Errors and Appeals (4 Vr. 430), case next reported herein.

the railway company was guilty of culpable negligence, although flagmen were kept at a place designated in a city ordinance, and the speed did not exceed what was authorized for one train by the ordinance.

2. The jury held to be justified in exonerating the plaintiff from the charge of negligence, when he was struck by one of the trains, while he was endeavoring to guard against injury from the other.

(Official syllabus to the Report.)

ACTION on the case, and rule to show cause, etc. *Rule discharged. Judgment for plaintiff.* "The suit was brought by the plaintiff to recover damages for injuries sustained from being struck on the head by one of defendants' engines, within the city of Newark. The jury gave a verdict of \$3,000 damages against the defendants. A rule to show cause why there should not be a new trial was obtained, and was argued before the Chief Justice and Justices Haines, Elmer and Bedle."

J. P. JACKSON and BRADLEY, for defendants.

SILAS WHITEHEAD, for plaintiff.

**Elmer, J.** — The plaintiff's action in this case was for injuries occasioned by one of the defendants' engines striking him on the head, within the limits of the city of Newark, on the afternoon of July 20th, 1864. A verdict having been rendered in his favor, and his damages assessed at three thousand dollars, several reasons have been insisted on for setting aside this verdict and awarding a new trial.

In the first place, it was urged that the evidence did not warrant the jury in finding that the agents of the company had been guilty of any culpable negligence.

It appeared that the plaintiff, a boy of the age of thirteen years and seven months, living near the road, who had been sometimes seen to jump on the cars as they passed, had been sent, by his grandparent, across the railroad avenue to procure a basket of shavings, and while in the act of returning, was struck by an engine, attached to a regular train, proceeding at the usual time, from the direction of Elizabeth city towards New York. The boy's attention appeared to be directed to a train which at the same time was coming from the opposite direction, on a track near to and east of that on which the Elizabeth train was running, so that he did not see or hear that train; and it was also testified that he was a little hard of hearing. The train coming from New York was the express train, and was said, by the plaintiff's witnesses, to be running at the rate of about twenty-five miles an hour, and made a great deal of noise with the



whistle and bell, while the other train, said to be running at the rate of about fifteen miles an hour, was not heard to ring a bell or blow a whistle, until just as the boy was struck. No evidence was produced by the defendants which materially contradicted these statements, except so far as might be inferred from the fact that the trains were accustomed to stop at a station about 600 feet distant from the place of the accident.

No street crossed the railroad avenue at the place where the boy was walking; but planks had been laid, by direction of the president of the company, for the convenience of foot passers, upon which he was attempting to cross, and which were opposite to and corresponded with a street called Johnson street, extending eastward from the railway. There were public streets on each side of, and parallel to, the railway tracks. No flagman was stationed at this crossing, but there were flagmen at all the crossings designated in an ordinance of the city regulating that matter, and this ordinance provided that such directions being complied with, the company should be allowed to run their trains at a rate of speed not exceeding twenty miles per hour, as to their mail or express trains, and should not be limited in the speed of their way trains to less than fifteen miles an hour.

There was evidence that the express train was running at a rate exceeding twenty miles, which it would seem the defendants might have contradicted if it was not true; and there was also evidence that the Elizabeth train that struck the boy gave no proper warning by their whistle or bell.

But throwing these circumstances out of the case, I think the jury were warranted in considering the absence of a flagman, or some other means of protecting persons crossing at a place where trains sometimes met and continued their ordinary speed within the limits of a populous city as culpable negligence. The ordinance upon which the defendants so much rely, and which they claim to have strictly complied with, does not refer to, or by any fair inference authorize, the running of two trains, on contiguous tracks, in opposite directions, so as to pass each other at the rates of speed mentioned. A speed that would be safe for one train alone might be exceedingly dangerous if kept up by two at the same place. That it was, in fact, highly dangerous was clearly shown by the evidence in this case.

In coming to this conclusion, I do not overlook the fact, so manifest in the judicial experience of this country and England,

that the sympathy of jurors is found very often to overmaster their judgments, so as to require very watchful vigilance by the courts, to prevent great injustice to railway companies, who are required by the public sentiment, largely participated in by the jurors themselves, to keep up a high rate of speed. This court has never failed to maintain such vigilance, and is not likely to relax it. But to take every case, however complicated in its details, and doubtful as to its true character, from the decision of the jury, or to interfere with that decision when not manifestly wrong, would be quite as great errors, and quite as dangerous to the community, as to err in the other direction.

Railways are a great public benefit, and for the sake of that benefit our citizens cheerfully submit to the dangers that necessarily result. But the fact that even when carefully managed they are liable to do great injury to innocent individuals makes it very important that every departure from the care and diligence justly demanded of them should be promptly and sternly rebuked. The true limit of discrimination between the court and jury in deciding such questions came under the consideration of the Court of Errors, in the case of the Central Railroad Co. *v.* Moore, 4 Zab. 824. (1) The charge of the judge in this case was in conformity with the ruling in that case, and in my opinion the evidence upon the question of negligence was properly submitted to them and rightly decided by the jury.

In the second place, it was insisted that the plaintiff was himself guilty of negligence, and is thus precluded from any right of recovery.

The judge was asked to charge that the plaintiff, by being on the track when the train was passing, was *prima facie* guilty of negligence, which he declined to do. It was held in the case of Central Railroad *v.* Moore that persons lawfully crossing a railway are bound to use such care and caution, to avoid danger, as ought under all the circumstances to be reasonably expected, and that the judge, in that case, the circumstances of which were more unfavorable to the plaintiff than the present, committed no error in submitting the question to the decision of the jury. The plaintiff here was crossing the avenue for a proper purpose, and could not be held *prima facie* guilty of negligence, merely because he happened to be on the track when the train passed. It appeared that he was carefully watching and keeping out of

1. See the MOORE case, reported in this volume, page 256, *ante*.

tried at a Circuit Court held in the county of Essex, before His Honor Justice Haines and a jury.

"The plaintiff examined a number of witnesses and then rested his case, and thereupon the counsel of the defendant moved the court to nonsuit the plaintiff 'for want of care on his part.'

"The motion having been refused, the counsel of defendants excepted to the ruling of the court, and filed a bill of exceptions, which was allowed and sealed."

The case having been removed into this court by writ of error, the following errors ere assigned:

"1. Because the court below, after the plaintiff had rested his case, refused to grant the motion made by the defendant to nonsuit the plaintiff.

"2. Because the justice, having refused to nonsuit the plaintiff, refused to charge the jury that the plaintiff had failed to make out a cause of action against the said defendants, but left the matter in the jury's hands upon the evidence of the case, without such instruction.

"3. General errors."

STONE & JACKSON, for plaintiff in error.

SILAS WHITEHEAD, for defendants.

**Elmer, J.** — The only question presented in this case is whether it was error in the judge at the Circuit to refuse to nonsuit the plaintiff "for want of care on his part."

It was held by this court, in the case of *Central R. R. Co. v. Moore*, 4 Zab. 824 (1), that a plaintiff suing for an injury caused by the negligence of the defendant will not be entitled to recover if his own negligence contributed to the injury; and that when the facts are clear and undisputed, and show a want of ordinary care on the part of the plaintiff, the question should be decided by the court; but if the evidence is doubtful, and the inferences to be drawn from it questionable, it is for the jury to determine. In my opinion, this was clearly a case for the jury. The plaintiff was in the act of crossing the railway in the city of Newark, at a place commonly used, and furnished with planking for that purpose. A train in plain sight was coming from the direction of New York, at a speed of twenty-five miles an hour, a rate exceeding that fixed by the ordinance of the city. He appears to have stood watching this train, on a track used for coal cars, there being another track between him and the track upon which

1. The *MOORE* case is reported in this volume, page 256, *ante*.

the New York train was running. As soon as this train passed he stepped upon the track next to him for the purpose of crossing, and was struck by a train coming from Elizabeth, which, it was stated, rang no bell and blew no whistle.

Under such circumstances, the inference to be drawn from the facts detailed by the witnesses were properly submitted to the jury. They were quite as doubtful as those in the case of *Central R. R. Co. v. Moore*, 4 Zab. 824. As I had occasion to remark then, it would be a plain case which will justify a court of errors in reversing a judgment because the judge declined to order a nonsuit.

In my opinion, the judgment should be affirmed.

*For affirmance:* BEASLEY, C. J., ELMER, VREDENBURGH BEDLE, DALRIMPLE, WOODHULL, DEPUE, OGDEN, FORT, WALES, CLEMENT, VAIL, JJ., 12; *for reversal:* KENNEDY, J.

**BOY RUN OVER BY TROLLEY CAR — RULE AS TO LOOKING AND LISTENING — STEAM AND STREET RAILWAY TRACKS.** — In *CONSOLIDATED TRACTION CO. v. SCOTT*, ADM'X, 58 N. J. L. (29 Vr.) 682 (1896), boy about eight years of age run over by trolley car at street crossing; judgment for plaintiff on verdict rendered in Hudson Circuit was affirmed. The syllabus by the court states the case as follows:

" 1. A street railway company propelling its cars by electricity along the public streets of a city owes a duty to the public which requires it to so regulate the movements of its cars at the intersection of such streets, when receiving or discharging passengers from a standing car, as not to unnecessarily expose pedestrians to the danger of collision with a passing car on the opposite track.

" 2. While a car of such company was stopping at a street crossing to receive and discharge passengers, a boy of the age of seven years and eight months, who was walking across the street from behind the standing car, was struck and killed by another of its cars passing from the opposite direction. The evidence tended to prove that the boy's view of the approaching car was obstructed until he had passed the standing car; that no bell or gong was sounded by the approaching car, which was going at the rate of six miles an hour, and that the boy did not look for an approaching car before entering upon the track where he was struck almost immediately upon stepping upon it, and carried a distance of thirty or forty feet before the car could be stopped. Upon the trial of an action for damages against the company for negligently causing the death, the trial judge refused motions to nonsuit and to direct a

verdict on the alleged grounds that there was no proof of negligence on the part of the company, and that contributory negligence was established on the part of the plaintiff's intestate, and ruled that the questions of negligence and contributory negligence were for the jury. *Held*, that the judge committed no error in so ruling.

" 3. It was also *held* to be no error in the judge to refuse to charge that it was not the duty of the moving car to stop before passing the standing car, the judge having already charged the jury that it was for them to say, under all the circumstances, whether it was negligence upon the part of the motorman to run past that standing car at that time and place or not.

" 4. The rule requiring one to look and listen before crossing a steam railway, in order to be in the exercise of due care, does not apply with equal force to one crossing the track of a street railway in a city street where the company and the public stand on an equal footing in the use of the highway; and it was *held* that it was not negligence *per se* in the plaintiff's intestate, under the circumstances, in going upon the defendant's track without first looking for an approaching car, and the judge's refusal to so charge was sustained, he having fairly submitted the question of contributory negligence as a matter for the jury to determine upon the facts in evidence.

" 5. When a child has reached the age of discretion and is considered *sui juris* as a matter of law, the degree of care and caution required of him will be no higher than such as is usually exercised by persons of similar age, judgment and experience, and whether that degree of care and caution has been exercised by the child in a given case is generally, if not always, a question for the jury."

BOY PLAYING IN STREET RUN OVER BY STREET CAR — CONTRIBUTORY NEGLIGENCE. — In *NORTH HUDSON COUNTY RY CO. v. FLANAGAN*, 57 N. J. L. (28 Vr.) 696 (1895), where boy nine years of age, playing ball on street, was run over by street car, it was *held* that nonsuit should have been granted and judgment for plaintiff reversed, it not appearing that the accident was the result of any wrongful or negligent act of defendant or its employees; it was also *held* that "the supplement to the 'Act concerning railroads and canals' (Rev. Sup., p. 824, § 9), which requires every action for injuries caused by the wrongful act, neglect or default of a railroad corporation to be commenced within two years after the cause of action shall have accrued, does not apply to street railway companies."

See also opinion of Supreme Court in the *FLANAGAN* case, *supra*,

57 N. J. L. 236 (1894), in which judgment for plaintiff was affirmed, but the Court of Errors and Appeals reversed this decision. (See preceding paragraph.)

See also *NEWMAN v. PHILLIPSBURG HORSE R. R. Co.*, 23 Vr. 446; *SHEETS v. CONNOLLY R'Y Co.*, 25 Vr. 518 (children injured on track).

## MATTHEWS v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY AND THE NEWARK PASSENGER RAILWAY COMPANY.

*Supreme Court, New Jersey, November Term, 1893.*

[Reported in 27 Vr. (56 N. J. L.) 34.]

**COLLISION BETWEEN TRAIN AND STREET CAR — PASSENGER ON STREET CAR INJURED — JOINT TORT-FEASORS.** — 1. One injured by a collision between a locomotive of a railroad company and a car (in which he was a passenger) of a street-railway company may maintain a joint action against both companies if the collision was produced by the neglect of the railroad company to give notice of the approach of the locomotive, concurring with the neglect of the street-railway company to observe proper care in crossing the railroad track.

2. Although such duties are diverse and the neglect to perform each is separate and disconnected, yet as the wrongdoing of one company unites with that of the other in causing injury, the tort is joint, and one or both tort-feasors may be sued.

3. If the jury negative the negligence charged against one of such tort-feasors, a verdict against the other is not objectionable.

*(Official syllabus to the Report.)*

### CASE CERTIFIED.

" Matthews, the plaintiff, brought an action of tort in the Essex Circuit against the defendants to recover damages for an injury received in a collision between a locomotive of the railroad company and a car (in which he was a passenger) of the railway company. There was a verdict in favor of the railway company and against the railroad company.

" The railroad company obtained a rule to show cause why the verdict against it should not be set aside.

" Plaintiff obtained a rule to show cause why the verdict in favor of the railway company should not be set aside.

" The rules were consolidated and certified to this court for its advisory opinion."

R. WAYNE PARKER, for plaintiff.

FLAVEL MCGEE, for the Delaware, Lackawana and Western R. R. Co.

SAMUEL KALISCH, for the Newark Passenger Railway Co.

**Magie, J.** — Counsel for the railroad company first urges that the verdict finding it to have been negligent was not supported by evidence or was contrary to the weight of evidence.

It is unnecessary to review in detail the case. The discussion of counsel was thorough and exhaustive, and much consideration has been given to the evidence. The conclusion reached is that there was evidence of the neglect of the railroad company to give due notice of the approach of its train sufficient to go to the jury, and although there was much opposing evidence, it did not so preponderate as to require or justify a new trial on this ground.

It is next claimed that the verdict awarded excessive damages. The amount awarded was large, but, considering the proofs of injury, it was not so large as to indicate mistake or misconduct on the part of the jury. The verdict ought not to be disturbed on that ground.

It is lastly contended on behalf of the railroad company that the verdict against it should be set aside because there was no proof of joint negligence on the part of the two defendants.

The claim is, as I understand from the argument, that these defendants cannot be jointly sued for an injury occasioned by such a collision, unless the neglect which caused the collision was of a joint duty owed by both defendants, and that, on failure of proof of a joint duty and joint neglect, neither defendant can be held.

If this contention is sound, it is obvious that the declaration was demurrable, for it charged that the railroad company owed to plaintiff a duty to give notice of the passage of its trains across the tracks of the railway company, and that the railway company owed to him a duty to take precautions in carrying him across the tracks of the railroad company, and it averred that each company had neglected to perform the several duties thus charged, and that thereby the collision which injured plaintiff occurred.

But the contention is wholly inadmissible, and the declaration would plainly have been good on demurrer. The error arises out of a misconception as to the nature of a joint tort.

If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the

tort is joint, and upon well-settled principles each, any or all of the tort-feasors may be held. But when each of two or more persons owes to another a separate duty which each wrongfully neglects to perform, then, although the duties were diverse and disconnected and the negligence of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint and the tort-feasors are subject to a like liability.

This doctrine was announced in this court by the Chief Justice in *Newman v. Fowler*, 8 Vroom, 89.

The like doctrine was applied by the Court of Appeals in New York to a case identical with that under consideration. *Colegrove v. New York & New Haven R. R. Co.*, 20 N. Y. 492 (9 Am. Neg. Cas. 618 n). That case has been mentioned with approval in *Barrett v. Third Avenue Railway Co.*, 45 N. Y. 628; *Slater v. Mersereau*, 64 N. Y. 138; *Arctic Fire Insurance Co. v. Austin*, 69 N. Y. 470; see also *Cooper v. Eastern Transportation Co.*, 75 N. Y. 116. The same view is taken in other courts. *Wabash, St. Louis & Pittsburg Railway Co. v. Shacklet*, 105 Ill. 364 (11 Am. Neg. Cas. 429 n); *Transit Co. v. Shacklet*, 119 Ill. 232; *Carterville v. Cook*, 129 N. Y. 152; *Cuddy v. Horn*, 46 Mich. 596. I have not discovered any dissent from this doctrine except in Pennsylvania, the courts of which State, while admitting the general rule, make an exception of cases where the injured party was the passenger of a carrier whose negligence concurred with the negligence of another in producing the injury. The reason of this exception, however, is that those courts adhere to the doctrine of *Thorogood v. Bryan*, 8 C. B. 115, which has always been repudiated in New Jersey, and is now expressly overruled in England (1). The *Bernina, L. R.*, 12 P. Div. 58; *S. C., L. R.*, 13 App. Cas. 1. The Pennsylvania cases are *Lockhart v. Lichenthaler*, 46 Pa. St. 151; *Carlisle v. Brisbane*, 113 Pa. St. 544; *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514; *Klauder v. McGrath*, 35 Pa. St. 128; *North Penn. Railway Co. v. Mahoney*, 57 Pa. St. 187.

The declaration, therefore, set out a good cause of action against two joint tort-feasors, and there can be no doubt that in such an action one defendant may be held liable alone if the proof justify it.

1. See discussion of *Thorogood v. Bryan*, 8 C. B. 115, in notes in 11 AM. NEG. CAS. 145-146 and 151-156.



The verdict against the railroad company should not be disturbed.

The verdict in favor of the railway company is also questioned by the plaintiff.

There was strong evidence of its negligence tending to produce plaintiff's injury, but it was encountered by contradictory evidence. The question was fairly submitted to the jury and no sufficient reason to disturb their verdict appears.

Let the Circuit Court be advised to discharge both rules.

**PEDESTRIAN CROSSING TRACK STRUCK BY TRAIN — CONTRIBUTORY NEGLIGENCE.** — In *WEST JERSEY R. R. CO. v. EWAN*, 55 N. J. L. (26 Vr.) 574 (1893), pedestrian struck by train at crossing, judgment for plaintiff was reversed for contributory negligence. The syllabus states the case as follows: "The plaintiff, traveling along a street on foot in the daytime, came to the defendant's intersecting railroad, which consisted of three tracks; he stopped upon the first track, which was not in use, for a freight train going towards his left on the furthest track to pass the crossing; this train made a 'tremendous noise,' as the plaintiff described it, and emitted smoke which settled down upon the tracks; when the freight train had passed, then, knowing that the middle track was used for trains coming from his left, he looked towards the left, and seeing nothing but smoke upon the tracks and hearing no whistle or bell, he proceeded to walk across at his usual gait, and was struck by a train coming from the left on the middle track. *Held*, that he was guilty of contributory negligence."

In the *EWAN* case, *supra*, *DIXON*, J., cited *Merkle v. N. Y., L. E. & W. R. R. Co.*, 20 Vr. 474, and *West v. N. J. R. R. & Tr. Co.*, 3 Vr. 91 and 4 Vr. 430 (reported in this volume), on the question of contributory negligence, and also *Heany v. Long Island R. R. Co.*, 112 N. Y. 122, a case similar to the *Ewan* case, where the plaintiff was held guilty of contributory negligence.

#### PEDESTRIANS INJURED ON TRACK.

Among New Jersey cases (other than those reported in this volume) relating to injuries to persons on track are the following:

*Woman run over by street car.*

*NEWARK PASSENGER R'Y Co. v. BLOCK*, 55 N. J. L. (26 Vr.) 605 (1893), woman crossing track run over by street car; judgment for plaintiff in Essex Circuit affirmed.

*Struck by train while crossing track.*

HAMMILL *v.* PENNSYLVANIA R. R. Co., 56 N. J. L. (27 Vr.) 370 (1894), person on footway used by public and running parallel with track struck by train while crossing track; judgment for plaintiff for \$2,000 affirmed.

*Struck and killed by train — Contributory negligence.*

DELAWARE, LACKAWANNA AND WESTERN R. R. Co. *v.* HEFFERAN, ADM'X, 57 N. J. L. (28 Vr.) 149 (1894), person on track struck and killed by train; nonsuit should have been granted; "there being no distracting danger and no obstruction to interfere with his view, the deceased was clearly guilty of contributory negligence in going on the track in front of an approaching locomotive, which he could have seen if he had looked before he stepped on the railroad tracks;" judgment for plaintiff reversed.

*Woman run over by trolley car.*

CONNELLY *v.* TRENTON PASSENGER R'y Co., 56 N. J. L. (27 Vr.) 700 (1894), woman struck by electric car while crossing track; error to nonsuit and judgment reversed.

*Deaf person struck by trolley car.*

BUTTELLI *v.* JERSEY CITY, HOBOKEN & RUTHERFORD ELECTRIC R'y Co., 59 N. J. L. (30 Vr.) 302 (1896), deaf person walking along track or narrow space between it and a ditch along the highway struck by trolley car; verdict for plaintiff sustained.

*Run over by street car.*

CONSOLIDATED TRACTION Co. *v.* ISLEY, 59 N. J. L. (30 Vr.) 224 (1896), pedestrian struck by street car; verdict for plaintiff.

CONSOLIDATED TRACTION Co. *v.* GLYNN, 59 N. J. L. (30 Vr.) 432 (1896), pedestrian run over by electric car; judgment for plaintiff affirmed.

**COLLISION BETWEEN VEHICLES ON HIGHWAY.** — In **DRAKE v. MOUNT**, 4 Vr. (33 N. J. L.) 441 (1867), collision between vehicles on highway, judgment for plaintiff (Mount) for \$341 rendered on verdict in the Somerset Circuit was affirmed. The syllabus states the case as follows:

"1. In an action brought by plaintiff to recover damages for an injury to his wagon and horses while traveling upon a public highway, by the carelessness and improper conduct of the defendant while traveling on the same public highway with his wagon and mules, if it appear that the defendant was guilty of carlessness and

negligence, which resulted in the loss of one of plaintiff's horses, and the plaintiff was not guilty of any negligence or carelessness which in any wise contributed to that result — the plaintiff is entitled to recover such amount of damages as will compensate him for his actual loss.

" 2. If defendant was guilty of no negligence, or, being guilty of it, the plaintiff was also guilty of negligence which in any degree contributed to the injury complained of, the defendant is not liable for any damage sustained."

VEHICLE DAMAGED IN COLLISION WITH TRAIN — LOOKING AND LISTENING — NONSUIT PROPERLY DENIED. — In *DELAWARE, LACKAWANNA AND WESTERN R. R. CO. v. TOFFEY ET AL.*, 9 Vr. (38 N. J. L.) 525 (1875), an action to recover damages for value of horse and wagon destroyed by collision with engine at crossing, judgment on verdict for plaintiff for \$295 and costs was affirmed. In discussing the first assignment of error, the form of verdict as to damages, the court held that the error was only in the matter of form. Continuing, the court (per *DEPUE, J.*), said: "The second error assigned is upon the refusal of the court to nonsuit. The ground on which the judge was asked to nonsuit was that the plaintiffs' driver did not exercise reasonable care in approaching the railroad crossing, and that, by his negligence, he had contributed to the injury.

"In an action for injuries resulting from the negligence of a defendant, if, when the plaintiff rests his case, it shall appear, by the evidence he has produced, that his own negligence contributed to the injury, it is the duty of the court to nonsuit, and in such cases error will lie for a refusal to nonsuit. *New Jersey Express Co. v. Nichols*, 4 Vroom, 434. But a nonsuit is only proper where, on the plaintiff's own showing, it clearly appears that he contributed, by his own carelessness, to the accident from which he received the injury. If the evidence is open to fair debate, and leaves the mind in a state of some doubt on this subject, the case should not be withdrawn from the jury. *Penn. R. R. Co. v. Matthews*, 7 Vroom, 531; *N. J. R. R. Co. v. West*, 4 Vroom, 430; *Central R. R. Co. v. Moore*, 4 Zab. 824 (1).

"The driver testified that after he turned out of Newark avenue into Grove street he stopped his horse about forty feet from the track; that he stopped to see if any locomotive was coming, because he knew it was a dangerous place; that he looked, but could not

1. The cases cited in the opinion in the case at bar are reported with the New Jersey cases in this volume of *AM. NEG. CAS.*

see anything; that he listened, but did not hear the engine run or the whistle blown; that he looked straight ahead; that he could not look up or down the track, because there were houses on the side. This testimony was in when the motion to nonsuit was made, and there were 'no conceded or undisputed facts that showed that it could not be true.' The nonsuit was properly denied.

"The third error assigned is upon the instructions to the jury on the same head. The charge was that the law requires of every one who is approaching a railroad track to listen and look before he crosses; that he must look each way just so far as it is practicable for him to do. If it be practicable to see up and down the track, he is bound to look, but if he could not see, the duty to look, of course, is not required of him. That if the driver discovered the approaching train, it was his duty to stop until it passed, but if he did not discover the train, as perhaps he did not, then the question was still open whether he exercised common care or not.

"These instructions were given in view of the testimony of obstructions in the way of vision down the track in the direction from which the engine approached. The judge had also, in the course of his charge, declared it to be settled law 'that a person approaching a railroad track must use his eyes and ears, and exercise the caution of a reasonably prudent man,' and had instructed the jury that if the driver, on this occasion, omitted such precaution, the plaintiff could not recover. The charge on this subject was in all respects correct.

"The fourth error assigned is upon the refusal to charge that 'as a matter of law it was the flagman's duty to signal the driver of the cart, without moving from his position between tracks to lay hold of the horse to stop him.' There was no error in refusing to make this charge.

"As a general rule, a railroad company is not bound to keep a flagman at the intersections of its road with public highways. *Penn. R. R. Co. v. Matthews*, 7 Vroom, 531. Where, by reason of extraordinary danger arising from the location of the track, a flagman is required, or the company relies on the presence of a flagman to negative negligence on their part in the running of the train, whether the conduct of the flagman was proper or not, is a question depending on the circumstances of each case. It is, therefore, obviously a question of fact for the jury, and not of law for the court. A judge may make such comments upon the testimony as he thinks necessary or proper for the direction of the jury in determining the questions of fact which it is their province to determine, but he is not bound to do so. The matter is entirely one of judicial discretion.

which is not subject to review in error. *Bruch v. Carter*, 3 Vroom, 554. There is no error in the proceedings below, and the judgment should be affirmed."

*Vehicle damaged in collision with train—Flagman at crossing.*

IN *PENNSYLVANIA R. R. CO. v. MATTHEWS*, 7 Vr. (36 N. J. L.) 531 (1873), action for damages for injuries to horses and wagon run over by train, judgment for plaintiff was affirmed. It was held that, "as a general rule, a railroad company is not bound to keep a flagman at the points where its road intersects public highways."

*Horse frightened by noise of train at crossing.*

*BITTLE v. CAMDEN AND ATLANTIC R. R. CO.*, 55 N. J. L. (26 Vr.) 615 (1893); horse frightened by noise of whistle of train at crossing, running away and injuring person who was leading him away from track; judgment of nonsuit reversed.

*Animals killed on track.*

IN *VANDEGRIFT v. REDIKER*, 2 Zab. (22 N. J. L.) 185 (1849), action for killing of plaintiff's cow by an engineer of the Camden and Amboy R. R. Co., caused by collision of locomotive with the animal on track, it was held that the engineer was not liable where the cow was at large and strayed on the track. It was also held that "the owner of cattle is bound to keep them in his own close at his peril, and nothing but wilfulness on the part of the engineer would make him liable for the loss of a cow so exposed by the fault of the owner."

See also *COXE v. ROBBINS*, 4 Halst. (9 N. J. L.) 384; *CHAMBERS v. MATTHEWS*, 3 Harr. (18 N. J. L.) 368.

IN *VANDUZER v. LEHIGH AND HUDSON RIVER R'y Co.*, 58 N. J. L. (29 Vr.) 8 (1895), it was held that "railroad companies, incorporated under the general act, are bound to put up and maintain, at farm crossings, fences and gates. If cattle escape on to the track and are killed by a locomotive, by reason of the deficiency of such fences or gates, the company is liable to indemnify the owner."

## NEW MEXICO CASES RELATING TO COLLISIONS AND CROSSINGS.

*Mule Killed by train—Presumption of negligence.*

IN *ATCHISON, TOPEKA AND SANTA FE R'y Co. v. WALTON*, 3 New Mex. 319 (1886), mule killed by train, it was held that the mere fact of killing or injuring animals on track does not constitute any presumption of negligence; the specific negligent act complained of

must be proved by the plaintiff (citing numerous authorities); judgment for plaintiff reversed.

*Trespasser on track struck by train — Assumption of risk.*

IN *CANDELARIA v. ATCHISON, TOPEKA & SANTA FE RY CO.*, 6 New Mex. 266 (1891), where plaintiff was struck by defendant's train while he was walking along the track on which he had no legal right, judgment for defendant was affirmed, it being held that plaintiff was a trespasser and assumed the risk of accident, and that his own negligence contributed to the injury.

## HARTFIELD v. ROPER AND NEWELL.

*Supreme Court of Judicature, New York (Albany), October, 1839.*

[Reported in 21 Wend. 615.]

**CHILD IN PUBLIC HIGHWAY RUN OVER BY SLEIGH — NEGLIGENCE OF PARENTS IMPUTED TO INFANT.** — Where a child of such tender age as not to possess sufficient discretion to avoid danger is permitted by his parents to be in a public highway without any one to guard him, and is there run over by a traveler and injured, neither trespass nor case lies against the traveler, if there be no pretense that the injury was voluntary or arose from culpable negligence on his part.

**CONTRIBUTORY NEGLIGENCE OF INFANT — IMPUTED NEGLIGENCE.** — In an action for such injury, if there be negligence on the part of the plaintiff, there cannot be a recovery; and although the child, by reason of his tender age, be incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of the parents or guardians of the child furnishes the same answer to an action by the child as would its omission on the part of the plaintiff in an action by an adult (1).

1. *Note on the Doctrine of Hartfield v. Roper — Imputed negligence.* — The New York rule as to Imputed Negligence of Parent to Child, which has been followed in many cases, is set forth in *Hartfield v. Roper*, 21 Wend. 615, and has been the subject of much comment in judicial opinions, text-books and legal periodicals. A brief discussion may not be out of place as a note to the case herein reported.

**HARTFIELD v. ROPER**, 21 Wend. 615, is a leading New York authority on Imputed Negligence of Parents in

cases of Injuries to Infants, and its ruling has been followed and approved in many New York cases. Its doctrine has been followed in other jurisdictions, as will be seen by reference to cases reported in the series of *AM. NEG. CAS.* and *Am. Neg. Rep.*, and it has also been opposed in many States. A note in 5 *Am. Rep.* 148, classes *Hartfield v. Roper* as the leading American case on the subject, and there is also a note to the report of the case in 34 *Am. Dec.* 273, citing it as a leading authority on the question. See also comment on the English doctrine of Imputed

**APPLICATION OF RULE.** — The same rule, it seems, would apply in an action by a blind or deaf man, or a person *non compos*, who, under similar circumstances, received an injury on a public highway.

**RIGHT OF ACTION BY INFANT.** — For an injury to a child of the most tender age an action may be brought in the name of the child. In England, it seems, it must be so brought, and that an action cannot be sustained in the name of the parent; whether that be the rule here, *query*.

Negligence, in which *Hartfield v. Roper* is cited as following the ruling laid down in *Thorogood v. Bryan*, 8 C. B. 115, but which ruling in the latter case has been repudiated in the English courts, in 11 AM. NEG. CAS. 152.

See also *Mowrey v. Central City R'y*, 66 Barb. 43, 5 AM. NEG. CAS. 179, in which *Hartfield v. Roper*, 21 Wend. 615, was followed as the law of the State of New York, and the court said that the English doctrine that "in an action for damages caused by negligence, the concurring negligence of the plaintiff, if a child of tender years, is not a defense," was repudiated by *Hartfield v. Roper*, *supra*. The *Mowrey* case was affirmed by the Court of Appeals, 51 N. Y. 666; 5 AM. NEG. CAS. 178.

See note on the doctrine of *Hartfield v. Roper*, 7 Am. Neg. Cas. 53.

In *MANGAM v. BROOKLYN R. R. CO.*, 38 N. Y. 455 (1868), the court, per GROVER, J., said: "The principle of this case (*Hartfield v. Roper*, 21 Wend. 615), has been since its determination often applied by the courts of this State to analogous cases, and must now be regarded as the settled law, notwithstanding a somewhat different rule prevails in some of the other States." Citing, *contra*, *Daley v. Norwich & Worcester R. R. Co.*, 26 Conn. 591 (and cases therein cited), and *Robinson v. Cone*, 22 Vt. 213, in which latter case the ruling in *Hartfield v. Roper* is criticised.

*Robinson v. Cone*, 22 Vt. 213, referred

to in the preceding paragraph, is one of the leading cases denying the doctrine enunciated in *Hartfield v. Roper*.

The case of *Hartfield v. Roper*, 21 Wend. 615, is cited in *Ginnon v. N. Y. & Harlem R. R. Co.*, 3 Robt. (N. Y.) 25, 5 AM. NEG. CAS. 708, 710 (what is negligence in law), and *Norfolk & Western R. R. Co. v. Groseclose*, 88 Va. 267, 7 AM. NEG. CAS. 51 (repudiating the doctrine). It is also cited in numerous cases in the series of AM. NEG. CAS. (vols. 1-12), and AM. NEG. REP. (vols. 1-11).

In *KUNZ v. CITY OF TROY*, 104 N. Y. 344 (1887), injury to child between five and six years of age, who was playing with dangerous obstruction on sidewalk, judgment of nonsuit was reversed. The court (per ANDREWS, J.) said: "In *Hartfield v. Roper*, 21 Wend. 615, it was held as matter of fact that there was no negligence on the part of the defendant, and that there was negligence on the part of the parents in permitting a child of two and a half years of age to be in the roadway. The new trial in that case was properly granted on either ground. There are some remarks in the opinion which, disconnected with the context, may be construed as sustaining the proposition that although there was no negligence on the part of the parents, the plaintiff could not maintain the action if the conduct of the child contributed to the injury. But we understand the present doctrine on this question to be that it is not sufficient to defeat a recovery for an injury to a child, not *sui juris*, caused

ACTION on the case, tried at the Oneida Circuit in May, 1838, before the Hon. Robert Monell, one of the Circuit judges. *Judgment for plaintiff reversed.*

The suit was brought by the plaintiff, William Hartfield, by his next friend, Gabriel Hartfield, for an injury sustained by being run over, as alleged, by the defendants, with a sleigh and horses,

by the negligence of a defendant, that the act of a child was one which in an adult would be deemed a negligent one contributing to the injury. There must also be concurring negligence on the part of the parents or guardians. (Citing *Ihl v. Forty-second street R. R. Co.*, 47 N. Y. 317; *McGarry v. Loomis*, 63 N. Y. 104.) In the absence of negligence on the part of the parents or guardians, the doctrine of contributory negligence has, in such a case, no application."

In *ELZE v. BAUMANN* (*Superior Court, New York, January, 1893*), 21 N. Y. Supp. 782, where boy six years old was run over by defendant's truck while he was attempting to cross street at regular crossing, judgment dismissing complaint was reversed. *McADAM, J.*, in discussing the question of negligence of infants and parents, said: "In *Hartfield v. Roper*, 21 Wend. 615, it was held to be negligence to allow a child of tender years to go into the highway unattended. In *Mangam v. Brooklyn R. R. Co.*, 36 Barb. 230, the court qualified this language by holding it was negligence 'knowingly to allow' a child of tender years to go at large in the public streets without a protector. But, on reversing the judgment of nonsuit, the Court of Appeals held (38 N. Y. 455) 'that the escape of the child into the street through an open window coming to within four feet of the ground—this being his only means of egress, the door being locked—will not warrant the conclusion as matter of law that the parent was guilty of negligence.'"

In *HENNESSEY v. BROOKLYN CITY R. Co.* (*Supreme Court, New York, Appellate Division, Second Department, June Term, 1896*), 6 App. Div. 206, where plaintiff, an infant about twenty-one months old, being carried in mother's lap in phaeton driven by the child's father, was injured in collision with defendant's street car, it was held that the negligence of the driver of the vehicle, he being the father of the plaintiff, was not imputable to the child, the latter being in the immediate custody of the mother, and judgment for plaintiff was affirmed. *CULLEN, J.*, in the course of his opinion, said: "The general rule, well settled by authority, is that in the case of an infant *non sui juris*, the negligence of his custodians, whether parents or persons to whose care the child has been intrusted, is to be imputed to the child. *Hartfield v. Roper*, 21 Wend. 615; *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 456."

In *METCALF v. ROCHESTER RY Co.* (*Supreme Court, New York, Appellate Division, Fourth Department, December Term, 1896*), 12 App. Div. 147, where plaintiff, a child four years and six months old, was riding in a wagon in charge of two young men, and in a collision between the wagon and street car the child was thrown from the wagon and injured, it was held that the negligence of the driver was imputable to the child, and judgment for plaintiff was reversed. *FOLLETT, J.*, in reviewing the authorities as to imputed negligence, cited *Hartfield v. Roper*, 21 Wend. 615, saying that



and having his arm broken. In March, 1836, the plaintiff, a child then of about two years of age, was standing or sitting in the beaten track of a public highway, and no person near him; the defendant Roper was driving a sleigh and horses upon the

case had never been overruled in this State (New York).

In *Norfolk & Western R. R. Co. v. Groseclose*, 88 Va. 267, 7 Am. Neg. Cas. 51, it was said that "the doctrine of *Hartfield v. Roper*, 21 Wend. 615, has been repudiated in this State, as in many other States of the Union," the doctrine in Virginia being "when the suit is by a parent for the loss of service caused by an injury to the child, the contributory negligence of the plaintiff is a good defense; but such negligence is not imputable to the child, and is consequently not to be considered, when the suit is by the child, or its personal representative. *Glassey v. Hestonville, etc.*, R. R. Co., 57 Pa. St. 172; *Huff v. Ames*, 16 Neb. 139."

In *Shearman & Redfield on Negligence*, § 73, p. 108 (5th ed.), it is said that "where one is driving a horse with ordinary care, at a rate of speed suited to the locality, he is, of course, not liable for an injury by the horse to a child who suddenly throws himself in the way, and is run over before the driver can prevent it." And in a footnote the authors add: "This was substantially the case in *Hartfield v. Roper*, 21 Wend. 615, and the court, therefore, held the defendant free from negligence. The opinion of the court upon all other points has been generally disapproved (see *Rauch v. Lloyd*, 31 Pa. St. 358; *Robinson v. Cone*, 22 Vt. 213), and has been completely overruled, so far as it undertakes to require from a little child the same degree of care as from a grown person. See *Moebus v. Herrmann*, 108 N. Y. 349, and *Beach, Contrib. Neg.*, § 119 (2d ed.)."

In § 74, p. 115, of *Shearman & Redfield on Negligence* (5th ed.), the learned authors say, on the question of imputation of parents' negligence: "The Supreme Court of New York in the leading case of *Hartfield v. Roper*, 21 Wend. 615, invented a rule that where a child, so young as not to be held responsible for the exercise of such care as is required from persons of full age, fails to exercise that care, the negligence of his parents or other lawful custodians is to be imputed to the child, in the same manner as if they were acting under his direction instead of his acting under theirs. Some of the decisions put this doctrine on the ground that the parent must in law be deemed the agent of the child; whilst in other decisions the courts refused to consider the question as one of agency, and put their rule upon the ground that the child is identified with its guardian; a legal fiction which led to the famous and now exploded decision of *Thorogood v. Bryan*, 8 C. B. 115. For one or the other reason, or no reason, this rule of imputed negligence seems to be at present established in *New York, Maine, Massachusetts, Delaware, Maryland, Indiana, Minnesota, Kansas and California*; although there is an increasing disposition in all these States to moderate the stringency of the rule." \* \* \* And in § 75 the learned authors criticise the rule in *Hartfield v. Roper*. Further on in their work (§ 78) the authors accept the Vermont rule (*Robinson v. Cone*, 22 Vt. 213), as the correct one and state that the same has been adopted in at least twenty States, and cite authorities, where the Vermont rule is law, in *Alabama, Connecticut, Georgia, Illinois, Iowa, Louisiana, Michigan, Mississippi,*

same road, and before the child was perceived the horses passed over him. He was discovered by Newell, the other defendant, who was in the same sleigh, and on his exclaiming that a child had been run over, the horses were immediately stopped by Roper and backed, and the sleigh prevented from passing over the child. The injury sustained was very serious; an arm of the child was broken, and he suffered greatly for about two months, and considerable expense was incurred in medical attendance. The sleigh was at the time of the injury descending a hill, at the foot of which was a bridge, and the child was in the road about six or eight rods from the bridge. The course of the road was such that in descending the hill there was a fair view of the road beyond the bridge. A daughter of the defendant, Newell, who was in the sleigh with her father, testified, however, that she did not perceive the child, although she sat on the side of the sleigh which passed over the track in which was the child. The defendant, Roper, had no sleigh bells. The horses at the time of the injury were trotting, but not at great speed; Roper sat on the front seat of the sleigh driving the horses, and Newell and his daughter sat on the back seat. The parties in the sleigh were not conversing at the time of the accident. The horses and sleigh belonged to Newell, but were let, together with a farm and other property, to Roper for a term not expired at the time of the accident. It was proved that Newell was esteemed to be worth \$10,000. Upon the above facts the defendant's counsel moved for a nonsuit; which the judge refused to grant. A motion was also made that the jury should be instructed to

*Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Pennsylvania, Texas, Utah and Virginia.*

The Vermont rule referred to (*Robinson v. Cone*, 22 Vt. 213), was applied in a case where a boy three years and nine months old, while coasting in the highway, lying upon his breast upon a sled, was run over by a sleigh, and it was held that he was not precluded from recovery. The court said: "We are satisfied that although a child or idiot or lunatic may to some extent have escaped into the highway through the fault or negligence of his keeper, and so be improperly there, yet if he is hurt by the negligence of the de-

fendant, he is not precluded from his redress. If one knew that such a person is in the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child or one known to be incapable of escaping danger." (See *Shearman & Redfield on Negligence*, §§ 73-78 and notes (5th ed.)

See also note on *IMPUTED NEGLIGENCE*, in 11 AM. NEG. CAS. 151-156; and also note on the *DOCTRINE OF THOROGOOD v. BRYAN*, 8 C. B. 115, in 11 AM. NEG. CAS. 145-146.

acquit Newell on the ground that there was no evidence against him, so that he might be improved as a witness for Roper, which the judge refused to do. The jury, under the charge of the judge, found a verdict against both defendants, with \$500 damages. The defendants asked for a new trial.

J. A. SPENCER, for defendant.

W. TRACY and W. C. NOYES, for plaintiff.

**Cowen, J.** — The injury to this child was doubtless a very serious misfortune to him. But I have been utterly unable to collect, from the evidence, anything by which the jury were authorized to impute such carelessness as rendered these defendants responsible. It is true, they might have seen the child from the turn of the road in descending, had they looked so far ahead; but something must be allowed for their attention to the management of the horses and their own safety in descending the hill to a bridge. So unobserving were they, in fact, that Mrs. Lewis, who sat in the rear of the sleigh, on the left side, and therefore in the best position of the three to overlook the road in its full extent, as far as the place where the child was, did not discern him. It was somewhat severe, in a case like this, to allow testimony of Newell's ability to pay, though it was not objected to. It seems to imply that he had been so brutal as silently to allow Roper's going on and endangering the child's life after he, Newell, had discovered it to be in the road. But, perhaps, no objection can now be heard to that evidence having been received, because it was not made at the trial.

No doubt the action was properly brought in the name of the child. Nor is there any objection to its form, since the statute (2 R. S. 456, sec. 16, 2d ed.). Nor could the father have brought an action for loss of service, in respect to so small a child, according to the English case of *Hall v. Hollander*, 4 Barn. & C. 660 (1); though I should think it quite questionable whether that case can be considered as law here.

If the defendants were, in truth, so reckless of the child's safety as to run over it in the way described, after knowing it to

1. In *Hall v. Hollander*, 4 B. & C. 660, it appeared that a boy two and a half years old was run over by a carriage and much injured. The parent, having expended some money in his cure, sued the owner of the carriage for loss of the services of his son as his servant. *Held*, that the plaintiff could not maintain the action because it was impossible that such a boy could render any services to him, and because the expenses incurred were not the gist of the action, the loss of services being the gist of the action.

be in the road, the verdict is none too large. But such trifling with human life ought not to be presumed; and there was no proof of it, either direct or circumstantial. This is not a case, however, for interfering upon the ground of excessive damages. The only question which seems to be open for our consideration is that of negligence. This respects both parties. It is quite necessary to drive at a moderate pace and look out against accidents to children and others, in a populous village or city. See *McAllister v. Hammond*, 6 Cowen, 342, and per Lawrence, J., in *Leame v. Bray*, 3 East, 597 (1). But this accident happened in the country, where was a solitary house; a child belonging to it happened to be in the road, a thing most imprudently allowed by its parents, and what could easily have been prevented by ordinary care. Travelers are not prepared for such things. They therefore, trot their horses. They are warrantably inattentive to small objects in the road, which they may be incapable of seeing in the course of a drive for miles through the country, among a sparse population. To keep a constant lookout would be more than a driver could do, even if he were continually standing and driving on a walk. Yet to this the matter must come, if he is to take all the responsibility. The roads would thus become of very little use in the line for which they were principally intended. It seems to me that the defendants exercised all the care which, in the nature of this case, the law required. If so, it is a case of mere unavoidable accident, for which they are not liable. *Dygert v. Bradley*, 8 Wend. 469, 472, 473; *Clark v. Foote*, 8 Johns. R. 421; *Penton v. Holland*, 17 Johns. R. 92.

Was the plaintiff guilty of negligence? His counsel seemed to think he made a complete exception to the general rule demanding care on his part, by reason of his extreme infancy. Is this indeed so? A snow path in the public highway is among the last places in this country to which such a small child should be allowed to resort, unattended by any one of suitable age and

1. In *Leame v. Bray*, 3 East, 593, it was held that where one accidentally drove his carriage against another's, the remedy is trespass and not case, the injury being immediate from the act done, though he were not otherwise blamable than driving on the wrong side of the road on a dark night. The distinction is that where the injury is immediate from an act of force done by the defendant the remedy is in trespass; where the injury is only consequential to an act before done by the defendant, there an action on the case lies.

discretion. The custody of such a child is confided by law to its parents, or to others standing in their place; and it is absurd to imagine that it could be exposed in the road, as this child was, without gross carelessness. It is the extreme of folly even to turn domestic animals upon the common highway. To allow small children to resort there alone is a criminal neglect. It is true that this confers no rights upon travelers to commit a voluntary injury upon either; nor does it warrant gross neglect; but it seems to me that to make them liable for anything short of that would be contrary to law. The child has a right to the road for the purposes of travel, attended by the proper escort. But at the tender age of two or three years, and even more, the infant cannot personally exercise that degree of discretion which becomes instinctive at an advanced age, and for which the law must make him responsible, through others, if the doctrine of mutual care between the parties using the road is to be enforced at all in his case. It is perfectly well settled that if the party injured by a collision on the highway has drawn the mischief upon himself by his own neglect, he is not entitled to an action, even though he be lawfully in the highway pursuing his travels (*Rathbun v. Payne*, 19 Wend. 399; *Burcle v. N. Y. Dry Dock Co.*, 2 Hall, 151), which can scarcely be said of a toppling infant, suffered by his guardians to be there, either as a traveler or for the purpose of pursuing his sports. The application may be harsh when made to small children; as they are known to have no personal discretion, common humanity is alive to their protection; but they are not, therefore, exempt from the legal rule, when they bring an action for redress; and there is no other way of enforcing it, except by requiring due care at the hands of those to whom the law and the necessity of the case has delegated the exercise of discretion. An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose, and in respect to third persons his act must be deemed that of the infant; his neglect, the infant's neglect. Suppose a hopeless lunatic suffered to stray by his committee, lying in the road like a log, shall the traveler whose sleigh unfortunately strikes him be made amenable in damages? The neglect of the committee to whom his custody is confided shall be imputed to him. It is a mistake to suppose that because the party injured is incapable of personal discretion, he is, therefore, above all

law. An infant or lunatic is liable personally for wrongs which he commits against the person and property of others. *Bullock v. Babcock*, 3 Wend. 391, 394. And when he complains of wrongs to himself, the defendant has a right to insist that he should not have been the heedless instrument of his own injury. He cannot, more than any other, make a profit of his own wrong. *Volenti non fit injuria*. If his proper agent and guardian has suffered him to incur mischief, it is much more fit that he should look for redress to that guardian than that the latter should negligently allow his ward to be in the way of travelers, and then harass them in courts of justice recovering heavy verdicts for his own misconduct.

The counsel for the plaintiff probably have the advantage of saying that the neglect of an infant has not, in any reported case, ever been allowed by way of defense in an action for negligently injuring him. But so far there is an equal advantage on the other side. The defense has not been denied in any book of reports. The defendant has also another advantage. The reports expressly say that negligence may be predicated of an infant or lunatic. All the cases agree that trespass lies against an infant. That was adjudged in *Campbell v. Stakes*, 2 Wend. 137, and *Bullock v. Babcock*, 3 Wend. 391. And it is equally well settled that where an injury is free from all negligence, as if it arise from inevitable accident, there trespass does not lie. *Weaver v. Ward*, Hob. 134; *Marcy, J.*, in *Bullock v. Babcock*, *supra*; *Dygart v. Bradley*, 8 Wend. 469. The cases maintaining trespass against an infant, therefore, imply that he may be guilty of negligence. Trover will also lie for a mere non-feasance, *e. g.*, a non-delivery of goods, where they do not come to the infant's hands by contract. *Lawrence, J.*, in *Jennings v. Rundall*, 8 T. R. 337 (1); *Campbell v. Stakes*, 2 Wend. 143. The cases most favorable to infants all agree in that. And so, where the contract of bailment to an infant has expired, it was agreed that, on non-delivery, the owner may maintain detinue, replevin or trover. *Penrose v. Curren*, 3 Rawle, 351; and see, per *Rogers, J.*, on p. 354. It was said trespass lies against an infant though only four years of age; 25 Hen. 6, 11 *b*, per *Wangford*, though this is put by *Brook* with a *query*; *Br. Abr. Corone*, pl. 6. No doubt, however, he may bring a suit at any age; and if that suit depends

1. In *Jennings v. Rundall*, 8 Term Rep. 335, it was held that a plaintiff cannot convert contract into a tort, so as to charge an infant.

upon a condition on his side, he must show that it was performed. It was said in *Stowell v. Zouch*, Plowd. Com. 364, if an infant lord, who has title to enter for mortmain, does not enter within the year, he shall be bound by his laches; "for there he had but title to a thing which never was in him." To warrant an action he must have entered within the year; and not having done so, he could have no remedy. Several like instances are put in the same page, which are also collected and arranged in 9 Viner's Abr. *Infant* (B. 2), pl. 7, 8, p. 376, of the octavo edition. But it is plain in the nature of things that if an infant insist on a right of action, he must show a compliance with the conditions on which his right is to arise, and this is entirely irrespective of his age. Land descends to an infant of a year old; and he is bound to make a share of the partition fence. He neglects to do so, whereby his neighbor's cattle enter and trespass upon the land. No one would think of contending that his neighbor must, therefore, be deprived of his defense. The infant has neglected to fulfill the condition, on which he could sue, or his guardian has done so, which is the same thing. He might as well sue because his neighbor has left a gate on his own premises open, through which the infant had crept, and fallen into a pit and hurt himself. The man has a right to keep his gate open, and the child's parents must keep him away. But one has no plainer right to walk about his own premises, and open and shut his own gates, than he has to travel in the highway with his horses. An infant creeps into the track from your field to your barn, and is injured by your driving a load of hay along the path; are you to be deprived of all excuse in an action for the injury?

The argument for this plaintiff goes quite too far and proves too much. It was said that drivers are bound to suppose that small children may be in the road, and as all the care lies on the side of the former, damages follow, of course, for every injury to the latter. Suppose an infant suddenly throws himself in the way of a sleigh, a wagon or a railroad car, by which his limb is fractured; it may be said, with equal force, he is incapable of neglect. So if he be allowed to travel the road alone in the dark. The answer to all this is, the law has placed infants in the hands of vigilant and generally affectionate keepers, their own parents; and if there be any legal responsibility in damages it lies upon them. The illustration sought to be derived from the law in

respect to the injury of animals turned or suffered to stray into the street does not strike me as fortunate. If they be there without any one to attend and take care of them, that is a degree of carelessness in the owner which would preclude his recovery of damages arising from mere inattention on the side of the traveler. Indeed, it could rarely be said that animals entirely unattended are lawfully in the roads or streets at all. They may be driven along the road by the owner or his servants, but if allowed to run at large for the purpose of grazing, or any other purpose, entirely unattended, and yet travelers are to be made accountable in all cases of collision, such a doctrine might supersede the use of the road, so far as comfort or expedition is concerned. The mistake lies in supposing the injury to be wilful, to arise from some positive act, or to be grossly negligent. Such an injury is never tolerated, be the negligence on the side of the party injured what it may. *Clay v. Wood*, 5 Esp. 44 (1); *Rathbun v. Payne*, 19 Wend. 399. But where it arises from mere inadvertence on the side of the traveler, he is always excused by the law on showing that there was equal or greater neglect on the side of his accuser. It is impossible to say, then, that the accuser was not himself the author of the injury which he seeks to father upon another.

My difficulty in the case at bar is to find the least color for imputing gross negligence, or, indeed, any degree of negligence to the defendants. But if there were any, there was, I think, as much and more on the side of the plaintiff. It therefore seems to me that here was a good defense established at the trial, on the ground that the defendants being free from gross neglect, and the plaintiff being guilty of great neglect on his part, indeed, being unnecessarily, not to say illegally, occupying the road, having no right there (for he does not appear to have been traveling, nor even on the land which belonged to his family), the injury was a consequence of his own neglect, at least such neglect as the law must impute to him through others.

Again, I collect from the evidence that Newell had demised the team for a term of two years, which was unexpired at the time of the injury, to his son-in-law and co-defendant Roper.

1. In *Clay v. Wood*, 5 Esp. 44, it was held that it is no justification to an action for negligent driving that the plaintiff was on the wrong side of the road, if there was room sufficient for the defendant to pass without inconvenience.



Newell then had no control of the team, and cannot be made liable without proof of positive and active concurrence in the injury, a thing for which there is no pretense in the proof, and which implies a barbarous temper, which the law cannot presume in any one. He, at least, should have been acquitted by the jury. He neither actually participated in the management of the team, nor could his interference have been legally efficient to prevent mischief. He had no lawful control of the horses. Roper was the exclusive *pro hac vice*.

The evidence, at the time when the motion was made to allow the jury to pass upon the case of Newell, had made out nothing actual against him, if Roper, the driver, may be said to have been implicated as a wrongdoer. But Newell might, at this stage, perhaps, have been regarded by the jury as owner of the horses, and Roper as his servant. The lease was not in proof. Constructively, his liability would follow from the neglect of his servant, and in this view it cannot be said there was no evidence against him. It is only where the evidence totally fails as to one whose case can be separated from the other that he is entitled to be acquitted for the purpose of being sworn as a witness for his co-defendant.

The motion for a nonsuit, which followed, seems to have been the more proper one; for I have been utterly unable to see that, so far, the evidence had made out any neglect, or the semblance of neglect, on the part of the defendants, while it had established clear neglect on the other side. But this question has been sufficiently dwelt upon in connection with the defendant's proofs and that which the plaintiff adduced at the close of the cause. It was enough if the cause of action was then made out, although the judge might have refused to nonsuit. It appears to me it was not.

It follows that a new trial should be granted. The costs should, I think, abide the event; for the judge erred in omitting to nonsuit the plaintiff. The case was certainly not made better for the plaintiff by the subsequent evidence. It is not, therefore, merely the case of a verdict against the weight of evidence which calls for payment of costs.

New trial granted; costs to abide the event.

**CONNOLLY v. KNICKERBOCKER ICE COMPANY.***Court of Appeals, New York, April, 1889.*

[Reported in 114 N. Y. 104.]

**BOY RIDING ON REAR PLATFORM OF STREET CAR INJURED IN COLLISION OF STREET CAR WITH ICE WAGON — NEGLIGENCE FOR JURY.** — In an action to recover damages for injuries sustained by plaintiff, a boy seven years of age, who, while riding on the rear platform of a street car, was struck by defendant's wagon, the wheel of which came into collision with the rear end of the street car, as the latter was turning from one street into another street, it was *held* that the question of negligence of defendant was one of fact for the jury to determine (1).

**DEGREE OF CARE REQUIRED OF INFANT.** — An infant seven years of age is chargeable with duty of exercising such care as may be reasonably expected of one of his age, and it is for the jury to determine question of contributory negligence.

**RIDING ON PLATFORM OF STREET CAR — WHEN CONTRIBUTORY NEGLIGENCE NOT A DEFENSE.** — While the fact that a passenger on a street car stands upon the rear platform when there is room inside the car may, in an action against the carrier, constitute a defense, the same defense is not available in an action brought by such person against a third party for injuries sustained by such third party's negligence.

**CHILDREN ON PLATFORMS OF STREET CARS — VIOLATION OF STATUTE — CONTRIBUTORY NEGLIGENCE.** — While the violation by a child of the statute prohibiting children, who are not passengers, from riding on street-car platforms may be shown, such violation does not, for all purposes, establish contributory negligence, especially where the child was on the platform by invitation of the conductor.

**APPEAL** from judgment of the General Term of the Supreme Court in the Second Judicial Department, entered upon an order made May 9, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict for \$2,000 in action brought by guardian for personal injuries sustained by collision between street car and wagon. The facts are stated in the opinion.  
*Judgment affirmed.*

ALFRED E. MUDGE, for appellant.

A. J. SKINNER, for respondent.

**Bradley, J.** — This action was brought to recover damages

1. *Children run over or injured by vehicles.* — Among the numerous cases decided in New York arising out of injuries to children caused by being run over in the streets by vehicles (other than street cars) are the following: 84 N. Y. 488; boy five years of age run over and killed by ice wagon; judgment for plaintiff for \$3,000 reversed for erroneous instruction that violation of ordinance in letting wagon stand alone in street was negligence.

KNUPPLE v. KNICKERBOCKER ICE CO.,

MURPHY v. ORR, 96 N. Y. 14; boy

resulting from personal injuries suffered by the plaintiff, alleged to have been occasioned by the negligence of the defendant. The injury was caused by a collision on Court street, in the city of Brooklyn, between a street car and the ice wagon of the defendant. The wagon was going one way and the car the other, and, as the car was turning from that street into another street, a wheel of the wagon came in collision with the rear end of the car, and the plaintiff was thrown from the side platform near that end of the car on which he was standing. The question of negligence of the defendant was, perhaps, a close one, but the evidence seems to have been such as to permit that imputation, and required the submission of such question to the jury as one of fact. Both the wagon and the car were properly in the street, and the duty was with the driver of each to use reasonable care against injury to others. In this instance they approached each other at or near the junction of Court and Nelson streets, and the car was on the curve, proceeding to turn into the latter street, when it was struck by the wagon.

The main evidence of negligence of the defendant was that relating to the speed it was being driven. There is evidence tending to prove that it was going rapidly, and continued to do so until the collision occurred. It is, however, said, with the support of evidence tending to prove the fact, that if the car had continued in Court street there would have been no collision; that the driver was not aware of the purpose to turn into the

four years old run over by wagon at crosswalk; judgment for \$2,500 affirmed.

*MOEBUS v. HERRIMAN*, 108 N. Y. 349; boy seven years old crossing street run over by defendant's wagon; judgment for \$3,500 affirmed.

*BIRKETT v. KNICKERBOCKER ICE CO.*, 110 N. Y. 504; girl between four and five years of age run over by ice wagon; judgment for plaintiff for \$1,500 affirmed.

*BARRETT v. SMITH*, 128 N. Y. 607; girl four years of age struck by wagon; judgment of nonsuit reversed.

See also the following New York cases relating to children run over by vehicles:

*Oelerich v. N. Y. Condensed Milk*

*Co.*, 127 N. Y. 680, affirming 6 N. Y. Supp. 127; *Moskovitz v. Lighte*, 140 N. Y. 619, affirming 68 Hun, 102; *Pressman v. Mooney*, 5 App. Div. 121; *Rotenberg v. Segelke*, 148 N. Y. 734, affirming 6 Misc. 3; *Cook v. Standard Oil Co.*, 9 App. Div. 105; *Mills v. Woolverton*, 9 App. Div. 82; *Henderson v. Knickerbocker Ice Co.*, 119 N. Y. 619, affirming 5 N. Y. Supp. 909; *Keller v. Haaker*, 2 App. Div. 245; *Goff v. Akers*, 139 N. Y. 653, affirming 1 Misc. 468; *Cowan v. Shyder*, 5 N. Y. Supp. 340; *Wright v. Wilcox*, 19 Wend. 343; *Ford v. Monroe*, 20 Wend. 210; *Edsall v. Vandemark*, 39 Barb. 589; *Weaver v. Bullis*, 128 N. Y. 634, affirming 14 N. Y. Supp. 338.

other street until both reached Nelson street, and that then it was too late for the driver of the wagon to avoid the collision caused by the swinging of the rear end of the car into the line of the wheels on one side of the wagon in making the turn, and that the driver did what he then could to get the wagon out of the way of the car. Upon evidence given on the part of the defendant, if taken by the jury as a full and correct representation of the situation, they could not properly have charged the defendant with liability. But the jury were permitted, upon evidence given upon the trial to find that when the movement was first made to turn the car, the defendant's driver, influenced by reasonable care, and in view of the situation and exercising it, may and should have slackened the speed of the wagon, and by doing so the collision and the consequences resulting from it would have been avoided. And that while the driver did not know or suppose, until the car reached the intersecting street, that it would be turned into it, the switch there would, if observed, have shown the opportunity to do so. The evidence on the part of the plaintiff and the inferences fairly derivable from it permitted the conclusion that the collision was caused by the negligence of the defendant's servant who was driving the wagon. The further question is whether it appeared that the plaintiff exercised the care required of him. The burden was with him to make it so appear by evidence. He was then of the age of seven years, and was chargeable with the duty of exercising such degree of care as could reasonably be expected of one of his age, which, in view of all the circumstances, was properly for the consideration of the jury upon the question of contributory negligence. *Barry v. N. Y. Central & H. R. R. Co.*, 92 N. Y. 289; *Byrne v. N. Y. Central & H. R. R. Co.*, 83 N. Y. 620; *Thurber v. Harlem B. M. & F. R. R. Co.*, 60 N. Y. 326.

There was some conflict of evidence in relation to the circumstances under which the plaintiff got on to the car, but the finding was permitted by it that the plaintiff, as he had done on one or more occasions before, appeared at the switch, turned it to enable the car to go from Court into Nelson street; that he did so by the request of the conductor, who told him to do it and get on the car; that the plaintiff did so with a view to obtaining from the conductor a penny, and that while he stood on the platform waiting for it the collision occurred which caused the injury. The plaintiff says he did not see the wagon, nor did he

look to see if any wagon was coming. The car was then turning on its way into Nelson street. He took no observation to see whether there was any danger to come from collision of the car with anything passing on the street. As matter of law, it cannot be said that he was required to apprehend that there might be an occurrence of that character or that he might be subject to such a cause of danger. So that the failure to look for approaching vehicles on the street was not necessarily negligence on his part. The fact that a passenger on a street car stands upon the outer platform when there is opportunity to take a seat in the car, might, in an action against the railroad company to recover damages as for its negligence under ordinary circumstances, constitute a defense. *Clark v. Eighth Ave. R. R. Co.*, 36 N. Y. 135 (9 Am. Neg. Cas. 654 n). But that may not be so when the action is against another party, as the defendant in such case cannot assert as a defense the mere duty of the passenger in his relation as such to the railroad company. We think the question of contributory negligence of the plaintiff was for the jury. And they were permitted upon the evidence to find that the negligence of the defendant was the sole cause of the injury. The motion for nonsuit was, therefore, properly denied, unless, as suggested by the defendant's counsel, the plaintiff was chargeable with such negligence by force of the statute, which provides that no minor child, not being a passenger, shall be allowed upon the platform or steps of any street car, and that it shall be the duty of constables, etc., to arrest any child violating such provision, who, upon conviction, shall be punished by fine not exceeding five dollars for the offense. (Laws of 1880, chap. 585.) While the violation of such statute may be proved as a fact for consideration by the jury, such violation does not for all purposes necessarily establish negligence. *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488. The getting upon the car was not the immediate cause of the plaintiff's injury, and assuming that the plaintiff violated the statute, he was not, for that reason, denied the right to assert the defendant's negligence as the cause of the injury and charge it with liability as the consequence. *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126 (9 Am. Neg. Cas. 587 n); *Platz v. City of Cohoes*, 89 N. Y. 220. In this case the finding was warranted that the plaintiff got on to the car, not as a passenger, but temporarily, by the invitation of the conductor. None of the defendant's exceptions were well taken. The judgment should be affirmed.

## CASEY, ADM'R, v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

*Court of Appeals, New York, November, 1879.*

[Reported in 78 N. Y. 518.]

**GIRL CROSSING RAILROAD TRACK AT STREET CROSSING STRUCK AND KILLED BY TRAIN — CONTRIBUTORY NEGLIGENCE FOR JURY.** — In an action to recover damages for negligent killing of plaintiff's intestate, a girl fifteen years old, who, while crossing defendant's tracks at a street crossing, was run over by a locomotive, it appeared from the evidence that no bell was rung, nor flagman stationed, as had previously been the case, at the place of accident; that the engine, with tender ahead and three cars behind, rushed backwards from a place where it could not well be seen, at a speed of from ten to twelve miles an hour; that deceased was approaching the northerly track from the south, from which point it was difficult to see into defendant's yard, where the most northerly track ran, until a person was on the track itself; that deceased had waited for a freight train to pass and was on the alert in looking for trains: *Held*, that the question of contributory negligence was one of fact for the jury to determine (1).

**APPEAL** from judgment of the General Term of the Court of Common Pleas, in and for the City and County of New York, affirming a judgment in favor of plaintiff, entered upon a verdict, for \$4,500. The facts are sufficiently stated in the opinion. *Judgment affirmed.*

FRANK LOOMIS, for appellant.

CHRISTOPHER FINE, for respondent.

**Miller, J.** — We agree with the opinion of the General Term that the motion made by the defendant for a nonsuit was properly denied. There was evidence showing that no bell was rung or whistle blown upon the engine which caused the death of the deceased; that no flagman was at or near the place where the accident occurred, as had previously been the case, and that the engine, with tender ahead and three cars behind, rushed backwards towards the deceased from a place where it could not well be seen, at a rate of speed from ten to twelve miles an hour. There is also proof that neither the fireman in charge of the engine nor the brakeman or the coupler could look west, on

1. *Accidents to children at crossings or relating to Children Injured on Tracks on steam railroad tracks.* — See Notes of or at Crossings. New York cases, at end of this case.

account of the tender in front being higher than the engine, and that they did not look in that direction. The evidence referred to was clearly sufficient to present the question as to the defendant's negligence to the consideration of the jury.

In regard to the contributory negligence of the deceased, it appears that she approached the northerly track on the west sidewalk of Tenth avenue on her way home, passed on the first rail of the northerly track, and was struck and killed. It also appears that the tracks running east and west across Tenth avenue, and especially the most northerly track, upon which the deceased was killed, after reaching the west line of a block of houses which front said avenue on the east side, run on a curve to the north, the yard of the defendant inclining in that direction; and it would seem that it was difficult, if not impossible, for a person coming south, as the deceased did, to see into the part of the yard where the most northerly track runs, until she arrived at the track itself. A moment before she was struck the engine started west some 100 feet in the northerly part of the yard entirely out of sight, and so far as was visible the track was unobstructed for her to proceed on her way home, as nothing intervened. The train having suddenly started, and almost in an instant, at a considerable rate of speed, as we have seen, passed over a distance of about 160 feet and caused her death. If she could not see at or near the place where she was struck, surely she was not negligent. It is true there is some evidence to show, and a civil engineer testifies that a person standing on the centre of the west sidewalk of Tenth avenue, three feet north of the north rail, can see along the north track a distance of seventy feet east of the house line on the east side of Tenth avenue, and there is some evidence tending in that direction. As the case stood, however, it was a question of fact whether she could have seen the train and thus avoided the accident. But even if she might have seen the train, it is by no means clear that she did not look and was unable to avoid the accident. According to the testimony of one of the witnesses, she halted at the lamp-post and there waited for a freight train to pass, and when her attention was drawn to this train which passed up, she started to go home, and the tender came along and struck her on the sidewalk. It thus appears that she was on the alert not long before the accident, looking around to pass in safety across the track; and in this respect the case differs from some of the

reported cases, which hold that the party being in a position where the train could be seen, and proper use been made of the faculties, is chargeable with contributory negligence. Considering the circumstances, the fact that her attention had been distracted by the freight train that she was seeking to avoid, and that it was at least doubtful whether she could have seen if she had looked; that the engine came upon her with great speed and almost instantaneously, so that it may have been out of her power to avoid the danger, it cannot be said as a matter of law that she was negligent, and it was for the jury to determine how the fact was.

The various exceptions relating to the admission and exclusion of evidence offered on the trial have received due consideration. Those which it is claimed called for the opinions of witnesses do not, we think, come within the rule contended for, and related to facts, and did not demand the opinions of the several witnesses to whom they were put. It is unnecessary to consider each of them in detail, as they rest upon the same rule, and no principle of law was violated by the rulings of the court in regard to them.

The testimony of the witness McLeary, as to what occurred after the accident, was properly admitted. It was properly following up the evidence which had previously been given by the same witness, and constituted a part of the transaction. No improper use could lawfully be made of such evidence, and the court, if called upon, would no doubt have instructed the jury accordingly. So also the question as to the habit of the company in keeping a flagman at the place in question was competent, in reference to the degree of care which the company had exercised. The evidence was admissible within the rule laid down in several reported cases. (*Ernst v. Hudson River R. R. Co.*, 39 N. Y. 61, 67; *Beisiegel v. New York Central R. R. Co.*, 40 N. Y. 9; *McGrath v. New York Central R. R. Co.*, 63 N. Y. 525; 59 N. Y. 468.) As to the other questions relating to the evidence, we are unable to discover that any error was committed by the court in its rulings.

The motion to dismiss the complaint was properly refused, for the same reasons that the motion for a nonsuit was denied.

The charge of the court that if the bell was not rung, the defendant was guilty of negligence, and the refusal to charge that it was not bound by statute to give notice of the approach



of this engine by whistle and by bell was, we think, correct. The various requests to charge were also properly overruled. Most of them were substantially covered by the charges as made, and those not so charged were not correct. The questions as to the admission of evidence and in reference to the charge are elaborately considered in the opinion of Daly, J., at General Term, and we do not deem it necessary to examine them more at length.

The judgment should be affirmed. All concur.

#### CHILDREN RUN OVER AT CROSSINGS OR STRUCK BY TRAINS WHILE ON TRACK.

Among the numerous cases arising out of Accidents to Children at Crossings or on Steam Railroad Tracks are the following:

*Boy run over at crossing.*

O'MARA *v.* HUDSON RIVER R. R. Co., 38 N. Y. 445; boy, eleven years old, run over and killed by train at crossing; judgment for plaintiff for \$1,500 affirmed.

*Boy found dead on track.*

REYNOLDS *v.* N. Y. CENTRAL AND H. R. R. Co., 58 N. Y. 248; boy thirteen years old found dead in cattle guard between tracks, being struck by passenger train while he was going home from school; judgment for plaintiff for \$800 reversed.

*Child straying from custody of parent, run over by train.*

PRENDEGAST *v.* NEW YORK CENTRAL & H. R. R. Co., 58 N. Y. 652; child two years of age getting out of custody of mother and going on track through opening in fence run over and killed by train; judgment for plaintiff reversed, and judgment against plaintiff.

*Boy driving across track struck by train.*

MORRISON *v.* NEW YORK CENTRAL & H. R. R. Co., 63 N. Y. 643; boy fourteen years old driving across track, struck and killed by train; judgment for plaintiff for \$2 000 affirmed.

*Boy killed at crossing.*

McGOVERN *v.* NEW YORK CENTRAL & H. R. R. Co., 67 N. Y. 417; boy eight years old going to school killed at crossing; judgment for plaintiff for \$2,500 affirmed.

*Boy run over by train.*

KENYON *v.* NEW YORK CENTRAL & H. R. R. Co., 76 N. Y. 607;

boy three years old run over by train; judgment for plaintiff for \$600 affirmed.

*Girl struck by train at crossing.*

BYRNE v. NEW YORK CENTRAL R. R. Co, 83 N. Y. 620; girl ten years old struck by train at crossing; judgment of nonsuit reversed.

*Boy killed by engine at street crossing.*

SCHWIER v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co., 90 N. Y. 558; boy four years old run over and killed by engine at street crossing; judgment for \$5,000 affirmed.

*Girl run over at crossing.*

DOWLING v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co. 90 N. Y. 670; girl nine years of age run over at crossing; judgment for \$5,000 affirmed.

*Boy killed at crossing — contributory negligence.*

WENDELL v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co., 91 N. Y. 420; boy seven years old killed by train at crossing; judgment for plaintiff for \$1,200 reversed for contributory negligence.

*Girl being driven across track struck by train.*

HOUGHKIRK v. DELAWARE & HUDSON CANAL Co., 92 N. Y. 219; girl six years old killed by train while being driven across track; judgment for plaintiff for \$5,000 reversed.

*Boy crossing track at place used as crossing.*

BARRY v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co., 92 N. Y. 289; boy ten years of age killed while crossing track at place used by public for crossing; judgment for plaintiff for \$3,000 affirmed.

*Girl struck by dummy engine at crossing.*

CUMMING v. BROOKLYN CITY R. R. Co., 104 N. Y. 669; girl five years old struck by dummy engine at crossing; judgment for plaintiff for \$10,000 affirmed.

*Child wandering from home and run over on track.*

CRYSTAL v. TROY & BOSTON R. R. Co., 105 N. Y. 164; child seventeen months old wandering from house onto track and run over by train; judgment for plaintiff for \$8,000 reversed.

On new trial in the Crystal case there was verdict for plaintiff for \$4,875, but on appeal judgment was reversed (124 N. Y. 519).

*Girl caught between rail and plank at crossing struck by train.*

SPOONER v. DELAWARE, LACKAWANNA & WESTERN R. R. Co., 115 N. Y. 22; child under fourteen years of age stepping on railroad

track and foot catching between rail and plank of crossing; the injured girl had warned some other children off the track as train was approaching, and not heeding her, she stepped on track to put them off; when foot was caught, she waved to the train, but engineer did not heed, and train ran over child, injuring her and causing leg to be amputated; judgment on verdict for \$20,000 affirmed.

*Girl injured at private crossing.*

SWIFT *v.* STATEN ISLAND RAPID TRANSIT R. R. Co., 123 N. Y. 645; girl fifteen years old struck by train at private crossing; judgment for plaintiff for \$575 affirmed.

*Boy killed by train at street crossing.*

TUCKER *v.* NEW YORK CENTRAL & HUDSON RIVER R. R. Co., 124 N. Y. 308; boy twelve years old killed by engine at street crossing; failure to look for train; judgment for plaintiff for \$2,000 reversed.

*Accidents to children at crossings.*

See also the following New York cases relating to Injuries to Children at Crossings or on Steam Railroad Tracks

Wiley *v.* Long Island R. R. Co., 144 N. Y. 717, affirming 76 Hun, 29; McGrath *v.* Hudson River R. R. Co., 32 Barb. 144; Haycroft *v.* Lake Shore, M. & S. R'y Co., 64 N. Y. 636, affirming 2 Hun, 489; Crone *v.* N. Y. Central, etc., R. R. Co., 141 N. Y. 604; Beckwith *v.* N. Y. Central, etc., R. R. Co., 125 N. Y. 759, affirming 54 Hun, 446; Burk *v.* Del. & Hudson Canal Co., 86 Hun, 519; Ryan *v.* N. Y. Central R. R. Co., 37 Hun, 186; Finklestein *v.* N. Y. Central, etc., R. R. Co., 41 Hun, 34; Gorham *v.* N. Y. Central, etc., R. R. Co., 23 Hun, 449; Cohn *v.* N. Y. Central, etc., R. R. Co., 6 App. Div. 196; Malone *v.* Boston & Albany R. R. Co., 51 Hun, 532; Collis *v.* N. Y. Central, etc., R. R. Co., 71 Hun, 504.

CHILD WANDERING FROM CUSTODY OF GUARDIAN GETTING THROUGH GATE OF FARM CROSSING ONTO RAILROAD TRACK—CONTRIBUTORY NEGLIGENCE OF PARENT—QUESTION FOR JURY—NONSUIT REVERSED.—In MEAGHER *v.* COOPERSTOWN & CHARLOTTE VALLEY R. R. CO. (*Supreme Court, New York, Fourth Department February, 1894*), 75 Hun, 455, an appeal from judgment dismissing the complaint in an action by plaintiff to recover damages for injury to his infant child, judgment was reversed (1). The facts, as stated

1. See the FOLEY case next reported, permitting young children to wander where nonsuit was affirmed, on the from their sight and go upon a railroad ground of the negligence of parents in track.

in the opinion by MARTIN, J., were as follows: " This action was to recover damages which the plaintiff sustained by reason of an injury to his infant child. The basis of the action was the alleged negligence of the defendant. The plaintiff, with his wife and daughter, who at the time of the accident was about nineteen months of age, resided in a house in front of which there was a public highway, and in the rear was the defendant's railroad. There was a private or farm crossing over the defendant's road, used for the purpose of passing from the premises occupied by the plaintiff to the other portions of the farm of which the premises occupied by him formed a part. The plaintiff, at the time his daughter was injured, was absent from his house, attending to the duties of his employment. The child was left in the care and custody of its mother, who was attending to her household work, in which she was assisted by Mrs. Smith, her sister. Mrs. Smith started to go out of doors to get some kindling wood, when the mother took the child from the chair in which she was sitting, and told her to go with her aunt, which she did. Unobserved by her aunt, and while she was engaged in splitting kindling wood, the child wandered onto the track of the defendant's road, which was about 190 feet distant, and was injured by one of its trains. The accident occurred at or near the crossing and within five minutes of the time when the child went out of the house. The evidence tended to show that the defendant failed to keep its barway at this crossing, which formed a part of its railroad fence, in a proper state of repair; that the first and second bars from the ground had been removed, and had not been in place for a considerable period of time; that the child passed through the barway in going onto the track; that the train stopped at Wilson's crossing, which was about 2,400 feet from the place of the accident; that the train approached the crossing where the accident occurred at the speed of thirty-one miles an hour; that the crossing was plainly visible for the distance of 1,250 feet before it was reached; that the day was bright and clear, and the track in good condition; that the train was light, consisting of an engine, baggage car, and one coach only; that the engineer saw the child when about 600 feet from her. At the trial the plaintiff offered to prove that Mrs. Smith had been accustomed to care for this child. This evidence was objected to, and excluded upon the theory that it was of no consequence. The plaintiff also offered to prove the distance within which such a train could be stopped, which was excluded upon the sole ground that it was a matter upon which expert evidence could not properly be received. To this ruling the plaintiff excepted. At the close of the evidence the defendant moved for a nonsuit on

the grounds that the plaintiff had failed to establish negligence on the part of the defendant; that the plaintiff and his wife were guilty of contributory negligence, and that the plaintiff could not maintain this action as father of the child. Thereupon the court said:

" 'There is only one question that you need to consider, Mr. Johnson, and that is the negligence of the plaintiff, or at least the negligence of the mother and Mrs. Smith. The testimony is in that regard, of Mrs. Smith, that the child's mother said to Mrs. Smith, "Go out with Aunt Annie." She did go out with Aunt Annie, and Aunt Annie commenced splitting up kindling wood from a board, and testified that she forgot about the child, and did not notice that it got away from her. Now, how can you reconcile that with the absence of contributory negligence? Nonsuit granted.'

"To this decision the plaintiff duly excepted. The plaintiff asked to go to the jury upon the whole evidence in the case, and especially upon the question of contributory negligence and the negligence of the defendant. This was denied, and the plaintiff excepted.

"It is manifest that the court nonsuited the plaintiff upon the express ground that he, or rather his wife, was guilty of negligence which contributed to the injury of the child, and hence the plaintiff could not recover in this action. The question here presented, then, is, was it negligence *per se* for the father of this child to leave it in the care and custody of its mother? Or if it be admitted that he was responsible for the acts of his wife, or that the question of contributory negligence was dependent upon her conduct, then can it be held, as a matter of law, that the mother was guilty of contributory negligence in permitting her child to go into the dooryard with its aunt, who was a married woman, mature in years, and who, the plaintiff offered to prove, was accustomed to care for this child? We think not. The child was not *sui juris*, and hence not chargeable with negligence. *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455; *Fallon v. Central Park, etc., R. R. Co.*, 64 N. Y. 13; *Stone v. Dry Dock, etc., R. R. Co.*, 115 N. Y. 104, 109. The mother was required only to exercise such a degree of care as was reasonable under the circumstances, and in her situation. Under the evidence, whether she exercised such reasonable care was a question of fact. Indeed, if the plaintiff was chargeable with the acts or omissions of Mrs. Smith, the question would still be one of fact to be submitted to the jury. *Weil v. Dry Dock, etc., R. R. Co.*, 119 N. Y. 147; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 507; *Kunz v. City of Troy*, 104 N. Y. 344; *Ames v. Broadway & S. A. R. R. Co.*, 4 N. Y. Supp. 803.

" In the Weil case, *supra*, the plaintiff, a child two years old, was left in charge of her father in his bakery. While she was behind the counter, he proceeded to make some entries in his books, when she went out of the door and was run over by the street car. All this happened within ten or fifteen minutes after plaintiff's mother had left her with her father. The plaintiff was nonsuited on the ground of her parents' negligence, and it was held error, and that the father was only required to exercise such a degree of care as was reasonable in his situation, and under all the circumstances, and whether he did so was a question for the jury. In the Birkett case it was held that it was not negligence, as a matter of law, for the parents of a bright child four and one-half years old, living in a crowded locality in a city, with no other place for amusement, to permit the child, with proper instructions and directions against going into the street, to play upon the sidewalk without an attendant, and that whether it was negligence under the particular circumstances was a question of fact for the jury.

" In the Kunz case, *supra*, it was held that it was not *per se* negligence on the part of a parent to permit a child *non sui juris* to play in the street, and that it was a question of fact for the jury to determine whether the father was guilty of negligence.

" In the Ames case, *supra*, a mother allowed the plaintiff, an infant five years of age, to play in a court, having near and easy access to a street, telling her not to leave the door. The infant went into the street, and was injured through the negligence of the defendant's servant. It was held that the question whether or not this permission to the infant to play in the court, without continued supervision or protection against her going outside the court into the street, was negligence on the part of the mother, was properly submitted to the jury.

" Further illustrations of the doctrine of the cases cited may be found in the following cases: *Prendegast v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 652; *Ihl v. Forty-second St., etc., R. R. Co.*, 47 N. Y. 317; *Bahrenburgh v. Brooklyn City, H. P. & P. P. R. R. Co.*, 56 N. Y. 652; *Mullaney v. Spence*, 15 Abb. Pr., N. S. 319; *Cosgrove v. Ogden*, 49 N. Y. 255; *Jetter v. N. Y. & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 458; *Downs v. N. Y. Central R. R. Co.*, 47 N. Y. 83; *Railway Co. v. Pearson*, 72 Pa. St. 169; *Walters v. Railroad Co.*, 41 Iowa, 71; *Railroad Co. v. Ormsby*, 27 Gratt. 455; *R. R. Co. v. McDonnell*, 43 Md. 534; *Railroad Co. v. Hanlon*, 53 Ala. 70; *Railroad Co. v. Bohn*, 27 Mich. 503; *R. R. Co. v. Stout*, 17 Wall. 657; *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332; *R. R. Co. v. Gladmon*, 15 Wall. 401. The general rule is that contributory neg-

ligence is a question of fact, and should be left to the jury, unless it so clearly appears from the circumstances or uncontradicted evidence as to leave no inference of fact in doubt. It is only in very exceptional cases that it can be adjudged as a necessary legal conclusion from the facts found. *Thurber v. Harlem B., F. & M. R. R. Co.*, 60 N. Y. 326; *Massoth v. D. & H. Canal Co.*, 64 N. Y. 529; *Sauerborn v. N. Y. Central & H. R. R. Co.*, 69 Hun, 429. We are of the opinion that under the evidence the question of contributory negligence was a question of fact, and that the trial court erred in not submitting that question to the jury.

"Whether the defendant's omission to properly maintain the barway at the farm crossing could be considered in this case upon the question of the defendant's negligence, is not free from doubt. In *Keyser v. R. R. Co.*, 56 Mich. 559, it was held that a railroad company's neglect to fence its track was for the jury to consider, as bearing upon its liability for an injury done to a child who got upon the track in consequence thereof. See also *Marcott v. R. R. Co.*, 47 Mich. 9; *Morrissey v. R. R. Co.*, 15 R. I. 271. A contrary doctrine seems to have been held in *Walkenhauer v. R. R. Co.*, 17 Fed. 136, and *Fitzgerald v. Railway Co.*, 29 Minn. 336. But, be that as it may, we think the question of the defendant's negligence should have been submitted to the jury. Obviously such was the opinion of the trial judge, as he nonsuited upon the express ground of contributory negligence, and stated that it was the only question the plaintiff need consider. As we have already seen, there was evidence that the train stopped 2,400 feet from the place of the accident; that it approached the crossing at the rate of thirty-one miles an hour; that the crossing was in plain sight for 1,250 feet; that the train was a light one, the track in good condition, and the day bright; and that the engineer saw the child when 600 feet distant from her. Moreover, the plaintiff offered to prove the distance within which such a train could be stopped. If this evidence had been admitted, it might have shown that if the engineer had made a proper effort the train could have been stopped after he discovered the child and before reaching her, and that she was too young to be conscious of the danger to which she was exposed. With this evidence in the case the question of the defendant's negligence would be one of fact, and should be submitted to the jury. *Chrystal v. Troy & Boston R. R. Co.*, 105 N. Y. 164; *Spooner v. D., L. & W. R. R. Co.*, 115 N. Y. 22. We think that that evidence was admissible, and that the court erred in holding that expert evidence upon that subject could not be given. *Mott v. Hudson River R. R. Co.*, 21 N. Y. Super. Ct. 345; *Eckert v. Railway Co.*, 13 Mo. App.

352; *Railroad Co. v. Dorsey*, 68 Ga. 228, 235; *Grimmell v. Railway Co.*, 73 Iowa, 93; *Whart. Ev.*, § 444. These views lead us to the conclusion that the judgment should be reversed, and the plaintiff awarded a new trial, when all the evidence bearing upon the question of the defendant's negligence can be presented. Judgment and order reversed, and a new trial ordered, with costs to abide the event." W. H. JOHNSON appeared for appellant. E. M. HARRIS, for respondent.

[The majority of the New York authorities cited in the *Meagher* case, *supra*, will be found reported or noted in this volume of AM. NEG. CAS., and the authorities cited from other States will be found in vols. 11 and 12 AM. NEG. CAS.]

CHILD WALKING ON TRESTLE, FALLING DOWN, STRUCK AND KILLED BY TRAIN — CONTRIBUTORY NEGLIGENCE — NONSUIT. — In *FOLEY v. NEW YORK CENTRAL & HUDSON RIVER R. R. CO.* (*Supreme Court, New York, Second Department, May, 1894*), 78 Hun, 248, appeal from a judgment of nonsuit in action for damages for negligently causing death of plaintiff's son, about four years and four months old, judgment was affirmed (1), the court (per DYKMAN, J.), stating the case as follows: "This is an action for the recovery of damages for causing the death of the plaintiff's intestate, who was his own son, about four years and four months old. The accident occurred on the West Shore Railroad, near New Windsor, and the facts are substantially as follows: The plaintiff resided at New Windsor, on the west side of a public road leading from the city of Newburg to Cornwall, and about 600 or 700 feet from the place where the accident occurred. He had a wife and two children residing with him — his son John, the deceased, four years and four months old, and a daughter Mamie, aged seven years. The children were playing near the house with Anna McCullough. The mother saw them all playing about 140 feet from the house at half-past two o'clock in the afternoon. The father saw them playing within about fifty feet of the house an hour before the accident. That is the last that either father or mother saw of the children until after the occurrence. The mother had seen Anna McCullough playing with her children on one or two occasions previous to this. On the afternoon of November 13, 1892, which was Sunday, Anna McCullough started with the other two children down the highway, and after

1. See the *MEAGHER* case, preceding facts, the question of contributory negligence was reported, where nonsuit was reversed, it being held that, upon the



passing some brick-yards they started and walked up the track of the West Shore road towards Newburg. They passed over one culvert or trestle above the Gillies' yard, and passed the Walsh yard, and were walking over the second culvert or trestle opposite the Christie yard. When upon the culvert they heard the locomotive whistle blow, looked back, and saw the cars coming. John, the deceased child, then tripped and fell upon the trestle, and was still down when the engine reached him. After the train passed the boy was found under the culvert, about the fourth tie from the north end, dead. Across the culvert or trestle were square ties or timbers about eight or ten inches apart, upon which the track was laid, the stringers running at the side of the track about six inches in height. The boy was struck by the Newburg local, which was running north. There were no highways crossing the tracks of the railroad between Cornwall and the city of Newburg — a distance of about four miles — and the accident occurred within those limits south of the city. The track is straight for three-quarters of a mile or more south of the culvert. The train consisted of three coaches, and a combined car, locomotive and tender. The air brakes and appliances were in good order. When about 1,000 or 2,000 feet away, the engineer looking through the cab window, saw something upon the track, and immediately blew the whistle. He then saw they were two girls. Both left the track, and then one turned and came back. He blew the whistle twice. When he saw one girl go back he applied the air brakes with one hand and reversed the engine with the other, and when he was within about 200 feet of the trestle for the first time he saw this boy. He was down on the trestle, and he only saw him from his body up. He could not see his arms, and the boy was lying with his face flat down. When the girl started back the engineer saw something which he thought was a dog, but which he immediately discovered was something else, and proved to be the deceased boy. At the time of the accident the train was running at a speed of from forty to forty-five miles an hour, which is not an unusual rate at that place, or at other points on the road between stations where the track is clear. To stop such a train, running at that rate of speed, would require a distance of about 1,000 feet. At the close of all the testimony upon the trial the defendant moved for a nonsuit on the ground of contributory negligence of the plaintiff, who was the father of the deceased, and also of the deceased, and that no negligence was shown on the part of the defendant, and the motion was granted. The plaintiff then appealed from the judgment which was entered in the action to the General Term.

"The nonsuit was based upon the failure of the proof to establish negligence against the defendant, but the question of the contributory negligence of the deceased is also presented upon this appeal, and both questions are, therefore, to be examined. While the deceased child was *non sui juris*, and was incapable of forfeiting his legal rights by his own negligence, yet, if his parents were negligent, their carelessness may be imputed to him. They were his keepers, to whose exclusive care and custody he is confided, in contemplation of law. If, therefore, they allow him to be heedlessly instrumental in his own injury, they cannot recover damages therefor. Such a rule would permit them to recover for injury resulting from their own misconduct. While the rule, however, will not excuse a voluntary injury or a grossly negligent act, it has full application to a case like the present, where neither is proven. Walking upon the track of the railroad would be regarded as negligent in an adult, and it must be deemed negligent in the deceased child. If the rule now is as it seems to be, *Kunz v. City of Troy*, 104 N. Y. 351 — that the negligence of parents must concur with the negligence of the child to constitute contributory negligence — we think both are manifested by the testimony in this case. The child was unlawfully upon the railroad track with two other children, one nine and the other seven years of age. They had been away from their parents over one hour. They were near a railroad which was in full operation, and therefore palpably a place of danger. The father and mother were both at home, and knew their children were out on the street, near a place of great danger. They must be deemed to have possessed knowledge that such children were prone to wander into by and forbidden places. We think it was negligence *per se* to have allowed those children to wander away as they did. In relation to the negligence of the defendant, it is to be said that there are no highway crossings for several miles below the city of Newburg, and therefore there was no reason why the train should have diminished its speed. There is no proof that the track or any of the appliances of the train were in disorder. The engineer was on his guard, and his testimony is all we have to prove what he saw. He did see the children, and sounded the alarm, but he was not then bound to stop his train: as it was light, and there was no noise to drown the blast of the whistle, he had a right to assume that the children would hear the alarm and leave the track, as there was no difficulty in their so doing. They had only to step aside a few feet, upon the other track, and he could not assume that either of them would fall. 'All the engineer was bound to do after the discovery of the peril was to use reasonable

diligence and care to avoid it.' *Chrystal v. Troy & B. R. R. Co.*, 105 N. Y. 164, 124 N. Y. 519. We find the evidence insufficient to sustain a finding that he did not use reasonable care or was guilty of negligence.

"Upon the trial the testimony to show that the people about New Windsor were in the habit of going up and down the railroad track at the point in question was excluded, and that exclusion is now assigned as error. Such testimony would only show that many people committed trespass upon the railroad, and it was properly excluded. Our conclusion is that the judgment should be affirmed with costs." JOHN M. GARDNER appeared for appellant. ASHBEL GREEN (A. S. CASSEDY, of Counsel), for respondent.

[The cases cited in the FOLEY case, *supra*, appear in notes to New York cases in this volume of AM. NEG. CAS.]

## THOMPSON, ADM'X, v. BUFFALO RAILWAY COMPANY.

*Court of Appeals, New York, February, 1895.*

[Reported in 145 N. Y. 196.]

**DEGREE OF CARE REQUIRED OF INFANTS.** — An infant not shown to be *non sui juris* is expected and required to exercise the measure of care and caution that is common and usual in persons of its age (1).

**PEDESTRIANS CROSSING STREETS — RIGHT OF WAY OF STREET CARS.** — Whilst persons have the right to cross streets at any place they may select, and are not confined to street crossings, street railway cars

1. *Contributory negligence of infants* — *Degree of care required.* — In Thomas on Negligence, p. 383, the rule as to contributory negligence of infants is thus stated:

"In New York and some other States it is considered where the child is *non sui juris*, that is, without the discretion or ability to care for his own safety, his parent, guardian or usual protector, in legal theory, shares in the child's responsibility, so that, in a given instance of injury through defendant's negligence, the inquiry is, not entirely, and may be not at all, whether the child was guilty of contributory negligence, but was the parent, guardian or

usual protector guilty of negligence contributing to the accident. But in a majority of the States this doctrine is not accepted in an action brought in behalf of the infant himself for injury, but only where the action is by the parent for his own benefit."

"Whenever care is required of a child he is not bound to exercise the care demanded of an adult of ordinary capacity, but only such care as would naturally be expected of a person of his age; and greater care must be exercised for the protection of children than is requisite in the case of an adult."

between such crossings have a preference, and whilst they must be managed with care so as not to injure persons in the street, pedestrians must, nevertheless, use reasonable care to keep out of their way.

**GIRL PLAYING ON STREET RUNNING ACROSS TRACK IN REAR OF STREET CAR AND STRUCK BY ANOTHER CAR — CONTRIBUTORY NEGLIGENCE.** — In an action to recover damages for the negligent killing of plaintiff's intestate, a girl fourteen years of age, who was run over by one of defendant's street cars as she was running across the street, it appeared that the deceased, with other girls, were playing on the street when she started to run across the street in the rear of a street car that was passing and was run over by a street car coming from the opposite direction; that the car was going at a higher rate of speed than sanctioned by city ordinance, and no gong was sounded announcing its approach; that deceased knew of the danger of crossing the track in such a manner as she did, without looking for an approaching car. *Held*, that the deceased was guilty of contributory negligence (1).

O'BRIEN, J., dissented.

**APPEAL** from judgment of the General Term of the Superior Court of Buffalo, entered upon an order made July 2, 1894, which overruled defendant's exceptions and directed judgment in favor of plaintiff upon verdict. The facts are sufficiently stated in the opinion. *Judgment reversed.*

PORTER NORTON, for appellant.

GEORGE W. COTHRAN, for respondent.

**Haight, J.** — This action was brought to recover damages for the alleged negligent killing of plaintiff's intestate. Alcy, the deceased, was a daughter of the plaintiff, fourteen years of age, large for her years, and had been to school for two years.

The defendant was engaged in operating an electric double-track street railway in Broadway, in the city of Buffalo.

On the 26th day of May, 1893, between eight and nine o'clock in the evening, Alcy, with six other girls, were engaged in playing "I spy" on Broadway, nearly in front of her residence, between Warner and Rother avenues. Alcy was on the northerly side of Broadway, and started to run across to the southerly side. As she approached the northerly track of the defendant's road a car from the east going west passed. She stopped until the car was by and then started to run across the street in the rear of the car, and as she reached the southerly track she was struck by one of defendant's cars going east on that track and killed.

Upon the trial evidence was given on behalf of the plaintiff

1. *Children run over by street cars.* — See notes of New York cases at end of this case, relating to Accidents to Children on Street-car Tracks.

tending to show that the defendant's car upon the southerly track was proceeding at a higher rate of speed than was sanctioned by the ordinances of the city, and that no gong was sounded announcing its approach.

The only question which we are called upon to consider relates to the contributory negligence of the deceased. This question is presented by motions for nonsuit, for a direction of a verdict, and by a request that the court charge the jury "that if the girl passed immediately behind the west-bound car, without stopping to look in both directions to ascertain if a car was approaching, that the plaintiff cannot recover," all of which were refused and exceptions taken.

Although a minor, no claim is made that Alcy was not *sui juris*. Whilst she may not have possessed the judgment, caution and prudence of persons of more mature years, she was expected and required to exercise the measure of care and caution that is common and usual in one of her age. She was familiar with the defendant's tracks, cars, and their mode of operation. It is true that the day before the defendant had changed its motor power from horses to electricity, but we are unable to discover how she was misled or deceived by this change. Whilst persons have the right to cross streets at any place they may select, and are not confined to street crossings, street railway cars between such crossings have a preference, and, while they must be managed with care so as not to injure persons in the street, pedestrians must, nevertheless, use reasonable care to keep out of their way. *Fenton v. Second Ave. R. R. Co.*, 126 N. Y. 625.

In *Baker v. Eighth Ave. R. R. Co.*, 62 Hun, 39, a child eight years of age passed behind a car going in one direction on to the other track, and was struck by the horses of another car going in the opposite direction, and it was held in the First Department that there could be no recovery.

In *Reich v. Union R. Co.*, 78 Hun, 417, a boy was playing in the street with some comrades in the evening. It was pleasant, but dark. His comrades started to chase him. He ran behind a car going north, crossing the avenue diagonally, tending towards the south, and when he stepped upon the south-bound track was struck by a south-bound car and killed. It was held that a nonsuit was proper.

In *Scott v. Third Ave. R. R. Co.*, 41 N. Y. St. Rep. 152, the

plaintiff and her husband were attempting to cross 125th street, in the city of New York, upon which cable cars are operated, about half-past nine o'clock in the evening. They approached the track and stopped for a car to pass going west. As soon as the car cleared the crosswalk they proceeded to cross, and, upon stepping upon the south track, were struck by an east-bound car. A judgment in favor of the plaintiff was reversed.

In *Tucker v. N. Y. Central & H. R. R. Co.*, 124 N. Y. 308, a boy twelve years old was killed by one of the defendant's locomotives when attempting to cross its tracks. The day was windy and it was snowing, but not enough to obstruct the view. The street upon which he was traveling was crossed by four of defendant's tracks. He stopped in the centre of one of the tracks facing in the direction of the locomotive, which was backing down at a high rate of speed. If he had looked he could have seen the approaching engine. From the point where he stood to the centre of the track, where he was struck and killed, the distance was fourteen feet. After changing a bag he was carrying from one shoulder to the other, he started on without again looking in the direction of the engine. It was held that he was guilty of contributory negligence. See *Wendell v. N. Y. Central & H. R. R. Co.*, 91 N. Y. 420; *Reynolds v. N. Y. Central, etc., R. R. Co.*, 58 N. Y. 248; *Davenport v. Brooklyn City R. R. Co.*, 100 N. Y. 632.

Such is the trend of the authorities, and applying the rule repeatedly asserted in this court to the facts under consideration, we can discover no theory upon which this judgment can be sustained. The deceased knew of the danger, and of the necessity to keep a lookout for passing cars, and yet, evidently interested and excited by her game, dashed suddenly across the street in the rear of a passing car without pausing to look or observe the approaching car upon the other track.

It is said that she may have been deceived in reference to the approaching car by reason of its speed, but she could not have been deceived unless she saw it. Had she seen it approaching before the other car passed, she would hardly have been justified in attempting to cross the street after the first car had passed without again looking for the approaching car.

The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur, except O'BRIEN, J., dissenting.

## ACCIDENTS TO CHILDREN ON STREET-CAR TRACKS.

Among the numerous New York cases relating to Injuries to Children on Street-car Tracks are the following:

*Child run over by horse car.*

OLDFIELD *v.* NEW YORK & HARLEM R.R. Co., 14 N. Y. 310; child seven years of age run over by defendant's horse car; judgment for plaintiff for \$1,300 affirmed.

*Boy crossing street run over by street car.*

HONEGSBERGER *v.* SECOND AVENUE R. R. Co., 2 Abb. Ct. App. Dec. 378; boy six years of age crossing street on way home from school run over by defendant's street car; judgment for plaintiff reversed.

See CASEY *v.* N. Y. CENTRAL, ETC., R. R. Co., 78 N. Y. 518, 12 Am. Neg. Cas. 309, *ante*, which appears to reverse the ruling in the Honegsberger case, *supra*.

*Girl run over by rapidly-driven street car.*

JETTER *v.* NEW YORK AND HARLEM R. R. Co., 2 Abb. Ct. App. Dec. 458; girl six years old run over by street car which was driven around curve from its depot into street at rapid rate of speed; judgment for plaintiff for \$1,000 affirmed.

*Boy crossing street stumbling and run over by horse car.*

MENTZ *v.* SECOND AVENUE R. R. Co., 3 Abb. Ct. App. Dec. 274; boy eight years old crossing track, stumbling and run over by horse car; judgment for plaintiff for \$4,500 affirmed.

*Child wandering from custody of guardian and run over by street car.*

MANGAM *v.* BROOKLYN R. R. Co., 38 N. Y. 455; boy four years old getting out of sight of sister and straying on track, run over by street car; judgment of nonsuit reversed, it being held that the parent was not necessarily negligent in omitting to prevent the child getting out of custody. (See abstract of the case in note to Hartfield *v.* Roper, 21 Wend. 615, reported in this volume, page 294, *ante*.)

*Child straying on track and run over by street car — Negligence of parents.*

BULGER *v.* ALBANY R'Y Co., 42 N. Y. 459; child two years old permitted by mother to go into street, straying on track and run over and killed by horse car; judgment of nonsuit affirmed.

*Boy in care of child, crossing track, slipping and run over by street car.*

IBL *v.* FORTY-SECOND AND GRAND STREET FERRY R. R. Co., 47 N. Y. 317; boy three years of age, in care of child nine years old, crossing track, slipping and run over and killed by street car; judgment for plaintiff for \$1,800 affirmed.

*Boy riding in wagon falling off and run over by street car.*

BAHRENBURGH *v.* BROOKLYN CITY, ETC., R. R. Co., 56 N. Y. 652; boy three years of age, in company with sister six years old, riding in wagon, falling off wagon onto street-car track and run over by street car; judgment for \$2,500 affirmed.

*Boy running across track, struck by street car.*

THURBER *v.* HARLEM, B. M. AND F. R. R. Co., 60 N. Y. 326; boy nine years of age, going to school, running across track, run over by street car; judgment on verdict for \$10,000 affirmed.

*Boy run over by street car.*

FALLON *v.* CENTRAL PARK, N. & E. R. R. Co., 64 N. Y. 13; boy five years old run over on street-car track; judgment for plaintiff for \$7,500 affirmed.

*Child run over by street car.*

FURST *v.* SECOND AVENUE R. R. Co., 72 N. Y. 542; child run over by street car; judgment on verdict for \$5,000 reversed.

*Child killed by street car.*

ETHERINGTON *v.* PROSPECT PARK & CONEY ISLAND R. R. Co., 88 N. Y. 641; child run over and killed by street car; judgment for plaintiff for \$1,500 affirmed.

*Boy crossing street struck by street car.*

MOTEL *v.* SIXTH AVENUE R. R. Co., 99 N. Y. 632; boy eight years old, while crossing street, run over by street car; judgment on verdict for \$10,000 reversed for contributory negligence.

*Girl crossing street run over by street car.*

STONE *v.* DRY DOCK, E. B. & B. R. R. Co., 115 N. Y. 104; girl seven years old, crossing street, run over by street car; judgment of nonsuit reversed.

*Child straying from parent's custody run over by horse car.*

WEIL *v.* DRY DOCK, E. B. & B. R. R. Co., 119 N. Y. 147; girl two years of age escaping from father's custody, straying on track and run over by horse car; judgment of nonsuit reversed.



*Boy run over by horse car.*

MANAHAN *v.* STEINWAY AND HUNTER'S POINT R. R. Co., 125 N. Y. 760; boy twelve years old run over by horse car; judgment for plaintiff for \$2,500 reversed.

*Boy running across street in front of horse car.*

FENTON *v.* SECOND AVENUE R. R. Co., 126 N. Y. 625; boy ten years old running across street in front of approaching horse car run over and killed; judgment for plaintiff for \$3,200 reversed.

*Girl killed by street car.*

HUERZELER *v.* CENTRAL CROSS TOWN R. R. Co., 139 N. Y. 490; girl five years old run over and killed by street car; judgment for plaintiff for \$2,000 affirmed.

*Child killed by street car.*

KEENAN *v.* BROOKLYN CITY R. R. Co., 145 N. Y. 348 (1895); judgment for plaintiff (8 Misc. Rep. 601), reversed for refusal of court to charge that "the father has no legal claim to the earnings of the son beyond the age of twenty-one years." (The Keenan case was an action by the father for negligent killing of son five years of age.)

*See also the following New York cases relating to accidents to children on street car tracks:*

Hyland *v.* Yonkers R. R. Co., 119 N. Y. 612, affirming 4 N. Y. Supp. 305; Mallard *v.* Ninth Ave. R. R. Co., 15 Daly, 376; Cumming *v.* Brooklyn City R. R. Co., 104 N. Y. 669, affirming 38 Hun, 362; Burke *v.* Broadway & S. A. R. R. Co., 49 Barb. 529; Ames *v.* Broadway, etc., 122 N. Y. 643, affirming 4 N. Y. Supp. 803; Agnew *v.* Brooklyn City R. R. Co., 117 N. Y. 651, affirming 5 N. Y. Supp. 756; Ehrman *v.* Brooklyn City R. R. Co., 131 N. Y. 576, affirming 14 N. Y. Supp. 336; Giraldo *v.* Coney Island & B. R. R. Co., 135 N. Y. 648, affirming 16 N. Y. Supp. 774; Mason *v.* Atlantic Ave. R. R. Co., 140 N. Y. 657, affirming 4 Misc. 291; Dintruff *v.* Rochester City, etc., R. R. Co., 124 N. Y. 647, affirming 10 N. Y. Supp. 402; Cumming *v.* Brooklyn City R. R. Co., 109 N. Y. 95; Dorman *v.* Broadway R. R. Co., 117 N. Y. 655, reversing 5 N. Y. Supp. 769; Barry *v.* Second Ave. R. R. Co., 136 N. Y. 669, affirming 16 N. Y. Supp. 518; Timony *v.* Brooklyn City & Newtown R. R. Co., 145 N. Y. 648, affirming 10 Misc. 261; Tholen *v.* Brooklyn City R. R. Co., 151 N. Y. 627, affirming 10 Misc. 283; Baker *v.* Eighth Ave. R. R. Co., 62 Hun, 39; Reich *v.* Union R'y Co., 78 Hun, 417; Ogier *v.* Albany R'y Co., 88 Hun, 486; Bello *v.* Met. St. R'y Co., 2 App. Div. 313, affirming 14 Misc. 279; Coghlan *v.* Third Av. R. R. Co.,

47 App. Div. 12, affirming 16 Misc. 677; *Heinz v. Brooklyn Heights R. R. Co.*, 91 Hun, 640; *Bennett v. Brooklyn Heights R. R. Co.*, 1 App. Div. 205; *Reger v. Rochester R'y Co.*, 2 App. Div. 5; *Albert v. Albany R'y Co.*, 5 App. Div. 544.

**GIRL STRUCK BY STREET CAR AFTER SHE HAD ALIGHTED WITH PARENTS FROM ANOTHER CAR — CONTRIBUTORY NEGLIGENCE — IMPUTED NEGLIGENCE — QUESTIONS FOR JURY.** — In *KITCHELL v. BROOKLYN HEIGHTS RAILROAD CO.* (*Supreme Court, New York, Appellate Division, Second Department, June Term, 1896*), 6 App. Div. 99, an appeal from judgment entered in favor of plaintiff in the City Court of Brooklyn, in action for injury to plaintiff, a child a little over seven years old, who was struck by one of defendant's electric cars, judgment for plaintiff was affirmed (1), the facts being stated in the opinion rendered by WILLARD BARTLETT, J., as follows: "The plaintiff, at that time a child seven years and one month old, was injured on September 17, 1893, on Myrtle avenue, in the city of Brooklyn, by being struck and knocked down by an electric car, operated by the defendant corporation. She had been a passenger, with her father and mother, on a Greenpoint car, going toward the city hall. The family lived on the corner of Schenck street and Myrtle avenue, and the car which brought them homeward stopped, in order to allow them to alight, at a point about fifty feet west of Schenck street. The father and the little girl left the car first, and started in a diagonal direction toward their home. This would take them across the other railroad track in Myrtle avenue, along which are run the cars which go eastward from the city hall. The father testifies that, as he approached this track, he looked westward as far as Steuben street, 150 feet distant from where he stood, and saw no car approaching. Just then he heard an outcry from his wife, who was getting out of the car which he and the plaintiff had left; and, apparently feeling some anxiety on his wife's account, he turned back to look after her, leaving the little girl within a foot or eight inches of the east-bound track, continuing on toward his house, at the corner of Schenck street. According to the father's testimony, when he got back to the car he found his wife getting off, and thereupon started again toward where he had left the plaintiff. As he went back he says he heard some one shout: "Get out of the way," and perceived that the cry proceeded from a car com-

1. See also *Kitchell v. Brooklyn child, who was injured by street car Heights R. R. Co.*, 10 Misc. 277, (see case at bar); verdict for plaintiff affirmed in 151 N. Y. 630 mem., action for \$2,000. by father for loss of services of his

ing up town, on the other track. Meantime the plaintiff, who had evidently gone upon the east-bound track and then turned to follow her father, was struck by the car on the left side of the head and otherwise so severely injured, notwithstanding the efforts of her father to assist her, that she subsequently suffered the amputation of her left thumb. There was also proof in behalf of the plaintiff tending to show that the car, at the time of the accident, was moving at the rate of from twelve to fifteen miles an hour; that it moved forty feet after it struck the plaintiff before it stopped, and that no bell was rung or gong sounded as the car approached.

"There was a verdict for the plaintiff, upon which a judgment was entered, which is now attacked on four grounds: First, because of the alleged error of the trial judge in not holding, as matter of law, that the plaintiff was *sui juris*; second, because it is said that even if the plaintiff was *non sui juris*, her father was clearly guilty, according to his own testimony, of contributory negligence which is imputable to the child; third, because the testimony in behalf of the defendant made the negligence of the father still more manifest; and, fourth, because there was no evidence at all of negligence on the part of the defendant.

"There is no doubt that the question whether the plaintiff was *sui juris* or not was properly submitted to the jury. *Stone v. Dry Dock, etc., R. R. Co.*, 115 N. Y. 104. In the case cited the age of the injured child was seven years and three or four months, very nearly the same as that of the plaintiff in this action, and the Court of Appeals held that the trial judge erred in granting a nonsuit on the ground that the plaintiff was *sui juris*, saying that the question was one of fact for a jury, wherever the inquiry was material, unless the child was of so tender an age that the court could safely decide the fact. As to the alleged contributory negligence of the father, which the defendant would impute to the plaintiff, we think also that there was a question for the jury. The proof in the case indicated that the street was clear of any vehicles which could have obstructed the father's view as he looked westward along the east-bound track. If he tells the truth, no car was visible within 150 feet. The little girl is shown to have been bright and intelligent and accustomed to being out in the street; and we cannot say that, as matter of law, it was necessarily negligent for her father to leave her to make her way alone across the track when no car appeared to be approaching, and he was suddenly summoned away, by reason of some anxiety for the safety of his wife, under the circumstances disclosed by the evidence. Nor can we say that there was not sufficient evidence of the defendant's negligence to go to the jury.

If the jury believed the case, as presented in behalf of the plaintiff, they might well find that the accident was due to the high speed of the car, the omission to give timely warning of its approach and the failure to exercise due watchfulness on the part of the motorman.

"Two exceptions to rulings, in regard to the admission of testimony, are discussed in the brief for the appellant. A witness for the defendant testified that he saw the car which struck the plaintiff as it approached the Greenpoint car, upon which he was a passenger, and that it was going at a moderate rate of speed, and not as fast as they generally go. On cross-examination he was questioned in reference to the speed of the Greenpoint trolley cars generally, and said that he had not ridden on them previous to the day of the accident more than once or twice, and that the experience was a sort of novelty to him. He said the car he was on 'sometimes went pretty lively, and then again it didn't.' He was then asked how fast he supposed it went at the time it went the liveliest, and after saying that he could not give any idea he expressed the opinion that it went ten or twelve miles an hour at the fastest. It is argued that the question how fast the Greenpoint car went, which was standing absolutely still at the time of the accident, was wholly immaterial; and in one sense this is true; but the line of inquiry was proper enough, in order to test the trustworthiness of the statement made by the witness on his direct examination, in reference to the speed of the car which caused the accident, and as to which he had said that it was going moderately and not as fast as cars generally went. The other exception to which attention is called in the brief requires no discussion, inasmuch as the question to which it relates does not appear to have been answered. The judgment should be affirmed, with costs." MORRIS & WHITEHOUSE appeared for appellant. FREDERICK E. CRANE, for respondent.

## STEVES v. OSWEGO AND SYRACUSE RAILROAD COMPANY.

*Court of Appeals, New York, December, 1858.*

[Reported in 18 N. Y. 422.]

**DRIVING ACROSS RAILROAD TRACK — COLLISION WITH TRAIN — FAILURE TO SIGNAL DOES NOT EXCUSE CONTRIBUTORY NEGLIGENCE.** — Gross negligence in a person injured at a railroad crossing by a passing train will defeat his action for damages, notwithstanding the omission of those running the train to ring the bell or sound the steam whistle as required by law.

**DUTY OF RAILROAD COMPANY TO SIGNAL — EFFECT OF STATUTE — FAILURE TO SIGNAL.** — The effect of the statute is to superadd a duty upon the corporation, the disregard of which avails the injured party no otherwise than its omitting any common-law duty in respect to care in running the train.

*(Syllabus to Official Report.)*

**APPEAL** from the Supreme Court.

“ **ACTION** for damages from alleged negligence of the defendant in running a train of cars against the wagon in which the plaintiff was crossing the defendant's track. The trial was at the Onondaga Circuit, before Mr. Justice Bacon. Upon the conclusion of the plaintiff's evidence, which is sufficiently stated in the following opinion, he was nonsuited by the court and took an exception. The exception was heard in the first instance at General Term, and judgment being rendered for the defendant, the plaintiff appealed to this court.” The facts are stated in the opinion. *Judgment of nonsuit affirmed.*

**WILLIAM PORTER**, for appellant.

**THOMAS L. DAVIS**, for respondent.

**Harris, J.** — The testimony in this case presents an instance of surprising negligence and inattention on the part of the plaintiff. After riding along parallel to and in plain sight of the railroad track for the distance of about a mile, he undertook to cross the track, his horses being upon a walk. The day was cold and the wind blowing fresh from the northwest. He was traveling against the wind. His coat was turned up around his ears and a fur cap drawn down over them. With his hearing thus obstructed, and with abundant opportunity to see and avoid the approaching train, if he would but look, he advanced slowly upon the track. The only witness who saw the occurrence says: “ He did not increase his speed; he did not look back when crossing the track, or before; he did not turn his head either way, before or after he got upon the track.” Such negligence — such indifference to danger — is both unaccountable and inexcusable. The cars were passing at the usual time. With his sense of hearing unobstructed, the plaintiff might have heard the train long before it approached the crossing, and in abundant season to avoid even the possibility of danger. If, for his own comfort and to protect himself against the cold, he had chosen in any degree to deprive himself of the ability to hear, he should have used his eyes so much the more. Ordinary care for his own

safety would have prompted him, as he approached the crossing, to see, as he might well have done, whether the cars were not also approaching. It is obvious that a single look would have saved him from the disaster with which he met. One of his own witnesses, who stood forty rods west of the crossing, saw the cars when they were half a mile distant. He says he heard them enough, and that they had a bright light. He stood to see them come. That the plaintiff should have entirely omitted to look was the extreme of carelessness. Such carelessness is entirely inconsistent with a right to recover damages, founded upon the negligence of the defendants. The plaintiff is himself the author of his own injury.

The only delinquency imputed to the defendants, and upon which alone the plaintiff seeks to sustain his action, is their omission to ring their bell or sound their whistle as required by law. Laws of 1850, c. 232, § 39. Regarding this as a question of fact merely, the testimony was insufficient to require the judge, at the trial, to submit it to the jury. The evidence would not have authorized the jury to find, as matter of fact, that the bell was not rung. The only witness who had a fair opportunity to hear, and thus was qualified to give reliable testimony on the question, was Catharine Mooney. She stood in the door of the house where she resided, about three rods from the crossing and fronting the railroad track. She did not see or hear the cars until they came opposite her door, and she could not say whether they rang the bell or not. She heard the whistle just as the engine struck the plaintiff's wagon. The witness already mentioned, who stood forty rods west of the crossing, and who heard the cars, and saw their light and stood watching their approach, says he heard no bell. It is not likely he would have heard it, however faithfully it might have been rung. The wind was blowing "*very hard*" from the northwest, the very direction in which he stood from the cars. Under these circumstances the fact that he did not hear the bell was entitled to very little if any weight upon the question whether the bell was rung or not. The only other witness who was located in the vicinity of the occurrence was sitting in his house until the alarm was given that some one had been run over. Two other persons, who were passengers on the train, were examined. One of these testified that he did not hear the bell until they were at the bridge just north of where the collision had taken place, and that he had no

recollection of having heard the whistle at all, although it was abundantly proved that there was a sharp whistle just before the plaintiff's wagon was struck. The other passenger merely says that he did not hear the bell. He heard the whistle near the crossing. This is all the testimony on the subject. It is too slight to sustain a verdict. The only witness who would have been likely to hear it says she does not know whether the bell was rung or not. All who have been much accustomed to railroad traveling will agree that very little account should be made of the statement of two passengers that they did not hear the bell. It is my own belief, founded on some experience and observation, that it is very rare, if indeed ever, that a passenger can hear the bell upon the engine when the train is under ordinary headway, and the doors and windows of the car are closed. Conceding to the plaintiff, therefore, all the effect he can reasonably claim for the testimony, it is not sufficient to warrant a jury in finding, as a fact, that the defendants omitted to ring their bell. It would have been the duty of the court to set aside such a verdict as unsupported by evidence. Upon this ground alone the nonsuit was properly granted. *Stuart v. Simpson*, 1 Wend. 376; *Hartfield v. Roper*, 21 Wend. 615 (1); *Haring v. New York & Erie R. R. Co.*, 13 Barb. 9; *Labar v. Koplin*, 4 Comst. 547; *Brooks v. Buffalo & Niagara Falls R. R. Co.*, 25 Barb. 600 (2).

But if it be assumed that upon the question whether or not the bell was rung, the testimony was sufficient to sustain a verdict for the plaintiff, still I think the judge at the Circuit was right in granting the motion for a nonsuit. The defendants, if they omitted to ring their bell, or sound a whistle, as by law they were required to do, incurred the penalty prescribed for such neglect, and also rendered themselves liable for all damages which the plaintiff sustained "*by reason of such neglect.*" Laws of 1850, c. 232, § 39. It is not enough to entitle the plaintiff to recover that he establishes the fact that the defendants neither rang their bell nor sounded their whistle. Having established this fact, it must then appear that he has sustained damages by reason of this omission. This he did not do. On the contrary,

1. See *Hartfield v. Roper*, 21 Wend. 615, reported in this volume of AM. NEG. CAS., page 293, *ante*; and note thereto, pages 293-297, *ante*. *FALLS R. R. CO.*, 1 Abb. Ct. App. Dec. 211, affirming 25 Barb. 600, plaintiff's stopping team on track and run over by train; contributory negligence; judgment for defendant.

2. *BROOKS v. BUFFALO & NIAGARA*

as we have seen, he brought the injury upon himself by a most unexampled act of carelessness. It did not require even ordinary care to avoid the injury. The slightest attention to his own safety was all that would have been required. The plaintiff had lived near the crossing where he was injured, and in sight of the railroad, for many years. He had often crossed at that place in going to and returning from Syracuse. The cars were running at their usual hour. They might have been distinctly heard and seen, only for the trouble of listening and looking. They were both seen and heard, at the distance of half a mile, by one who had no better opportunity to see and hear than the plaintiff himself. His own witness, having heard the cars and seen their light, stood looking at them for ten or twelve minutes, as he says, before they came to the crossing. Under these circumstances, it cannot be said that his injury was produced by any neglect on the part of the defendants.

The case of *Brooks v. Buffalo & Niagara Falls R. R. Co.*, 25 Barb. 600, in most of its principal features, bears a strong resemblance to that now in hand, and in principle it is not distinguishable. In that case, as in this, the plaintiff sued for an injury which occurred at a crossing. The plaintiff there, as here, resided in the vicinity of the place where he was injured. The cars were running on their usual time, as they were in this case. The road upon which the plaintiff was driving ran at right angles with the track of the railroad. For the distance of seven rods along the road by which the plaintiff came to the crossing, the cars might have been seen, in the direction from which they came, at the distance of sixty or eighty rods. The plaintiff drove upon the track and there stopped, looking in an opposite direction from that which the cars approached, and remained until the collision took place; but how long it does not appear. It was assumed that the defendants did not ring their bell. This was the only negligence imputed to them. The action was brought in the Recorder's Court of Buffalo. The case was submitted to the jury, who rendered a verdict in favor of the plaintiff. Upon appeal to the Supreme Court, the judgment was reversed upon the ground that there was no question in the case to be submitted to the jury. Mr. Justice Greene, in a well considered opinion, pronounced the judgment of the Supreme Court. In alluding to the conduct of the plaintiff, he says: "It was an act of negligence, evincing a lamentable want of care, to drive



upon the track heedless of the approaching train, which he might have seen and avoided by turning his eyes in the direction where at least ordinary caution, under the circumstances, would have prompted him to look for it." The decision of the Supreme Court was affirmed by this court, upon appeal, in December, 1855 (1 Abb. Ct. App. Dec. 211). It seems to me that this decision should be regarded as conclusive upon the question now under consideration.

I am of opinion that the nonsuit was properly granted, first, because there was no sufficient evidence of any neglect of duty on the part of the defendants; and, secondly, if there was, the evidence shows that the plaintiff, by his own sheer recklessness, brought the injury upon himself. In the latter proposition a majority of the court concur. The judgment of the Supreme Court must therefore be affirmed.

[DENIO, SELDEN and PRATT, JJ., *dissented*, holding that the object of the statute requiring the ringing of the bell or sounding the whistle was to put persons, negligently approaching a crossing, upon their guard; and that the question whether the negligence of the plaintiff was such that, if the proper signals had been given, he would still have been injured, was one which should have been submitted to the jury.]

Judgment affirmed.

## JOHNSON, EXECUTRIX V. HUDSON RIVER RAILROAD COMPANY.

*Court of Appeals, New York, September, 1859.*

[Reported in 20 N. Y. 65.]

**CONTRIBUTORY NEGLIGENCE — ABSENCE OF.** — In an action for personal injury from negligence of the defendant, the absence of any fault on the part of the plaintiff may be inferred from the circumstances, in connection with the ordinary habits, conduct, and motives of men.

**BURDEN OF PROOF.** — It cannot be said as a universal rule either that it lies upon the plaintiff to prove affirmatively that he was not guilty of negligence, or upon the defendant to prove the contrary, in order to establish his defense.

**EVIDENCE — NEGLIGENCE.** — The character of the defendant's negligence may be such as *prima facie* to prove the whole issue; and the known indisposition of men needlessly to subject themselves to difficulty and danger is to be considered in determining the question.

**CONTRIBUTORY NEGLIGENCE — EVIDENCE.** — On the other hand, the case may be such — *e. g.*, a slight obstruction in a highway, plainly visible, and easily to be avoided by ordinary vigilance and care — as to make it necessary for the plaintiff to show, by independent evidence, that he did not bring the misfortune upon himself.

**NONSUIT — CASE FOR JURY.** — The propriety of a nonsuit in this class of cases cannot be determined by any general rule as to the burden of proof, but to carry a case to the jury it must be such, all the circumstances considered, as to authorize them to find that the injury was caused solely by the negligence of the defendant.

**DRIVER FOUND DEAD ON TRACK — STRUCK BY TRAIN — PRESUMPTION OF NEGLIGENCE.** — A horse car of the defendant was proceeding upon its railroad without lights or bells on a dark evening in a street of New York city, obstructed by a sewer in the process of construction. The plaintiff, a sober cartman, was found dead upon the track, under circumstances authorizing the inference that he had fastened his horse, and was groping in the dark to find a safe passage for his team, when struck by the defendant's car. There was no witness to the accident. *Held*, that the dangerous tendency of the defendant's car was such as, in the absence of any other evidence than the presumption that the plaintiff had the same regard for his safety as other men, to authorize the attributing of the accident to the negligence of the defendant, and the refusal of a nonsuit.

**NEGLIGENCE — INSTRUCTION.** — It is not error, in such a case, to charge that, to exonerate the plaintiff the negligence of the defendant must be such as contributed directly to the injury. The word, under the circumstances, is insignificant.

**DEGREE OF CARE REQUIRED OF RAILROADS AND TRAVELERS AT CROSSING.** — The degree of care required from the managers of a railroad in a highway, and of prudence on the part of one about to cross it, are proportioned to the danger of inflicting injury and the liability to incur it. The obligations of extreme care and of ordinary care are to be construed with reference to the particular circumstances of the case. The language of a charge in respect to degrees of care or negligence is to be interpreted accordingly, and not in any abstract technical sense.

(Syllabus to Official Report.)

**APPEAL** from the Superior Court of the City of New York.  
*Judgment affirmed.*

" **ACTION** for alleged negligence, by which the husband of the plaintiff (whose executrix she is) was run over and killed by a baggage train on the defendant's railroad. The accident occurred in West street, in which the railroad tracks ran, at its intersection with Gansevoort street, in the city of New York. A sewer had been excavated in Gansevoort street across West street and remained open on the east side of the last named street, so that it could not be crossed by carts; and on the west side of that street the passage was narrow and difficult, and some of the

witnesses testified that it was impossible to pass over it. The deceased was driving his cart on West street below Gansevoort street northerly towards his home in the upper part of the city, about eight o'clock in the evening of the 28th of August, 1853. It had rained, the night was dark, and there was no light at the intersection of West street with the sewer, from lamps or otherwise. No witnesses saw the accident. The cart of the deceased was found on the sidewalk near the south bank of the ditch, on the east side of West street, the horse being fastened; and the deceased was found lying across the rails and fatally injured by the cars having passed over him in going north. The plaintiff's theory was, that being unable to get across the sewer on that side of the street, the deceased had left his horse and cart, and was crossing the track to ascertain whether there was a passage on the other side, and in the act of crossing was struck by the train. The negligence imputed to the defendant was that their cars were driven without any bells on the horses, or any light upon the cars, and at a high rate of speed. Several witnesses for the plaintiff swore there were no bells; but one of the servants of the defendant testified that he had charge of the horses of the line, and uniformly put bells on them, and thought there were bells on the horses of this train. The evidence was undisputed that there were no lights. It appeared that the water upon the rails prevented the noise from the cars being heard, but that the noise of the horses' feet could be heard a short distance. The deceased was not an intemperate man, and it was positively shown that he was sober when he set out for home.

"The defendant's counsel moved for a nonsuit on the ground that the plaintiff had not shown that the deceased himself was free from negligence, and also that negligence on his part was to be inferred from the facts proved. The motion was denied, and the defendant's counsel excepted.

"The judge charged, amongst other things, that 'considering the nature of the business in which the defendants were engaged, and the hazard attending the running of cars in the streets of the city and particularly on a dark night, they were bound to exercise the utmost care and diligence; and for the purpose of avoiding accidents, endangering property and life, were bound to use all the means and measures of precaution that the highest prudence could suggest, and which it was in their power to employ. Hence,' he said, 'if the use of bells and of lights was

a measure that the prudence and foresight they were bound to exercise ought to have suggested, and if by such disastrous accidents would probably be avoided, the omission to use them, if proved to the satisfaction of the jury, was culpable negligence, and it was for the jury to say whether to this culpable negligence the fatal accident which had given rise to the action might not justly be imputed.' As to negligence on the part of the deceased, the judge charged that if the jury believed from the evidence that there was any negligence on the part of the deceased that directly contributed to the accident, the plaintiff would not be entitled to recover. He also said that the deceased was bound to exercise ordinary prudence and no more, and the question the jury were to determine was, whether it appeared from the evidence that there had been a want on the part of the deceased of that care and foresight that men of ordinary prudence are accustomed to employ, and which, placed in like circumstances with the deceased, they probably would employ; and in judging of the conduct and motives of the deceased, they were bound to consider all the circumstances of the case, as they had been established by the evidence. The defendant's counsel excepted to the several propositions in the portions of the charge that have been given; and he requested the judge to charge that the manner in which the deceased was found on the track was, without explanation, *prima facie* evidence of negligence on his part; and there was an exception to his refusal to give that instruction. There was a verdict for the plaintiff for \$4,000. After an affirmance of the judgment at the General Term, the defendant appealed here. On a former trial in the Superior Court the plaintiff had been nonsuited. The report of the decision setting aside the nonsuit is in 5 Duer, 21."

WILLIAM FULLERTON, for appellant.

HENRY MORRISON, for respondent.

**Denio, J.** — It is insisted on behalf of the defendants that the judge erred in refusing to hold as matter of law, upon the facts proved, that the deceased was guilty of negligence; that if any question upon that branch of the case could be left to the jury, still he erred in charging that the negligence which would preclude a recovery must be such as directly contributed to the injury; and finally that he erred in his statement of the measure of care and prudence required from the deceased and the defendants respectively.

*First.* The general rule has been so often laid down and reiterated, that to enable a party to recover in this class of actions the person injured must not by his own negligence have contributed to the injury, that it must be considered a legal postulate. I agree that this is an element in the definition of the cause of action, and that the plaintiff's case when presented to the jury must not be defective upon that point any more than upon that of the defendant's negligence. This is embraced in the proposition that the injury must be the result of the negligence of the defendants; for if the culpable conduct of both parties united in bringing it about, that proposition is not true. But I am of opinion that it is not a rule of law of universal application that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* in this, as in most other cases, depends upon the position of the affair as it stands upon the undisputed facts. Thus, if a carriage be driven furiously upon a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover though there were no witnesses of his actual conduct. The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of the defendant's conduct would create so strong a probability that the injury happened through his fault that no other evidence would be required. But if one make an excavation or lay an obstruction in the highway, which may or may not be the occasion of an accident to a traveler, it would be reasonable to require a party seeking damages for an injury to give general evidence that he was traveling with ordinary moderation and care. The obligation to give such evidence would be greater or less according as the impediment was more or less dangerous. Thus, in *Butterfield v. Forrester*, 11 East, 60 (1), the defendant, in making some repairs to his house in a town, had put up a pole across the road, leaving, however, a free passage by a branch or street in the same direction. The plaintiff rode against it and was injured. No question arose as to the *onus*; but it being proved that he was riding

1. In *Butterfield v. Forrester*, 11 East, 60, it was held that one who is injured by an obstruction in a highway, against which he fell, cannot maintain an action, if it appears that he was riding with great violence and want of ordinary care, but for which he might have seen and avoided the obstruction.

immoderately, it was held that he could not recover. So in *Smith v. Smith*, 2 Pick. 621, the defendant had piled cordwood by the side of the highway at the foot of a hill, and one stick projected eight inches into the road. The plaintiff, in a dark night, drove an overloaded wagon down the hill without any shaft-girth to the harness. The wagon struck the horse and he ran alongside of the wood pile and against the projecting stick and caused an injury. A verdict for the defendant was sustained by the court on the ground that the plaintiff's conduct had contributed to the accident. There was no controversy here as to the *onus*, all the facts being before the jury. If there had been no evidence of the circumstances, but only that the plaintiff had driven in the daytime against the stick of wood, and had been injured, although leaving the stick in that position was an act of negligence, still it might be reasonable to require the plaintiff to show that his carriage was properly equipped, and that he drove with ordinary circumspection, and in such a case I conceive that it might be quite right to nonsuit the plaintiff for not having made out a case proper to be submitted to the jury. But suppose the case of a dangerous excavation in a highway which a very prudent man might possibly avoid, but which he would be in great danger from, and a man was found to have fallen into it, the case being so situated that the precise circumstance could not be shown, must the plaintiff be nonsuited on the assumption of a positive rule of law requiring him to show affirmatively that the accident did not happen in part through his fault? I think not. The purpose of a jury trial is that the experience, intelligence and judgment of twelve men may be availed of to settle disputed questions of fact. The duty of the judge presiding at the trial is the same in this class of cases as in others; it is to determine whether a case is presented fit for the deliberation of the jury. This is to be decided, not by the application of any artificial rule respecting the *onus probandi*, but by considering the facts and circumstances in evidence in connection with the ordinary habits, conduct and motives of men. The culpability of the defendant must be affirmatively proved before the case can go to the jury, but the absence of any fault on the part of the plaintiff may be inferred from circumstances; and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration. Nor is it correct to say as a universal rule that the defendant must himself prove, in

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order to establish his defense, that the plaintiff was guilty of negligence. That, as well as the absence of fault, may be inferred from the circumstances, and the negligent act of the defendant may be of such a mitigated character, that a party complaining of an injury from it ought to show that it occurred without fault on his own part. This seems to me entirely consistent with the principle that the jury must, in order to find a verdict for the plaintiff, be able to say that the injury happened from the negligence of the defendant, to which the plaintiff did not by any act of his contribute. I have come to this conclusion, from the reason of things, and from general legal analogies; but I have not failed to look into the several cases to which we have been referred, and many others. It generally happens that the evidence on one side or the other discloses the material facts bearing upon the case, so that courts have not often been called upon to speak of the burden of proof as to the plaintiff's freedom from negligence. Besides the case of *Button v. Hudson River R. R. Co.*, 18 N. Y., 248 (1), in the decision of which we were not sufficiently agreed to make it a lucid precedent, I do not find that the question has been considered in the English courts or in those in this State. Upon the rule as to what the case then fully disclosed must contain the authorities are abundant, but this does not settle the question as to the burden of proof. There are two cases in the Supreme Court of Massachusetts, apparently, if not really, in hostility to the conclusion which I have stated. In *Lane v. Crombie*, 12 Pick. 177, the defendant was sued for driving over the plaintiff with a two-horse sleigh in the highway, and the plaintiff had a verdict. None of the evidence is given, nor any of the facts stated. It is merely said that the judge stated to the jury, in the course of his charge, that the burden of proof was upon the plaintiff to prove negligence in the defendants, that being the gist of the case; but that when the defendants relied upon the fact that the plaintiff conducted herself carelessly, the burden of the proof was upon the defendant to show that the plaintiff had not used ordinary care. This instruction was considered erroneous, and a new trial was ordered. The court said that in the actual state of the evidence it was extremely probable that the direction made no difference in regard to the result; still, it was said, if the evidence

1. *Button v. Hudson River R. R. Co.*, 18 N. Y. 248, is reported in this volume of *AM. NEG. CAS.*, p. 368, *post*.

was such that the jury might have decided the other way upon this point without going decidedly against the weight of evidence or in other words if the evidence was doubtful or balanced, such a direction may have had an influence to mislead the jury. Upon this I have to remark that in the absence of a statement of the nature and extent of the defendant's negligence, it is impossible to say that it was incumbent upon the plaintiff to show. If slight and not such as necessarily or probably to endanger a person on foot, then the plaintiff was bound to show that she did not by her own negligence bring the misfortune upon herself. I do not understand the court to hold that in all cases of injury from alleged negligence the plaintiff must prove affirmatively that he was without fault; but that in the case before them it was necessary for her to do so. If the case goes further, I think it cannot be sustained. The cases which the court refers to in its opinion are not upon the subject of the *onus probandi*. The case of *Adams v. Carlisle*, 21 Pick. 146, was an action against a town to recover damages sustained by the plaintiff by the overturning of his stage coach, in consequence of alleged defects in the highway. The facts are not stated, but the charge of the judge was that the burden of proof was upon the plaintiff to satisfy the jury beyond a reasonable doubt that the overturning of the coach was caused by a defect in the highway and not by his own negligence, and for that purpose to show that he was using ordinary skill and diligence at the time when the accident happened. The ruling was affirmed on a motion for a new trial. This, I think, was correct, if we assume that the defects shown to exist in the road were such as the driver of the coach in the exercise of ordinary caution could avoid. The court does not affirm that if there was no direct evidence as to the conduct of the driver, the plaintiff would necessarily fail; on the contrary, the Chief Justice remarks that proof that the person driving was commonly careful and skilful, that there was no apparent cause for the accident but the bad condition of the highway, and the condition in which the carriage was at the time, were all circumstances upon which the jury might pass their judgment, and infer that due skill and care were used.

The true rule, in my opinion, is this: The jury must eventually be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury. The evidence to establish this



accident, or in any other competent proof. To carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely essential that the plaintiff should give any affirmative proof touching his own conduct on the occasion of the accident. The character of the defendants' delinquency may be such as to prove, *prima facie*, the whole issue; or the case may be such as to make it necessary for the plaintiff to show by independent evidence that he did not bring the misfortune upon himself. No more certain rule can be laid down.

The present case is not wholly free from difficulty, but I think it presented a fair question for the jury. Its determination depended upon the view which should be taken of the tendency of driving a railroad train at considerable speed through a city street, not lighted, on a dark evening, and without any proper means of giving notice to persons who might be upon the track, and without any lamps on the cars to enable the driver to see what might be on the rails before him. That such running was hazardous in a high degree I cannot doubt. Then we are to consider that the railroad was at the same time a thoroughfare for persons on foot and with carriages, and that such persons might innocently be upon it at all times, save when the cars were actually passing, and also that at the point of intersection with Gansevoort street, West street was, upon one view of the evidence, substantially a *cul de sac* as to all purposes except the passage of the cars. The deceased was proved to have been perfectly sober on the night in question. The evidence left it to be inferred that he had been stopped by the excavation and the earth thrown up on its margin; and the inference was a probable one that, having fastened his horse, he was groping his way to the other side to see whether there was an outlet there when the cars came upon him. If the forward car had been suitably lighted in front, it would have warned him and at the same time have notified the driver; or if the horses had been provided with bells, it may well be that he would have heard them and have moved off the track. In the absence of proof to the contrary, we are to assume that he had the same regard for his own safety as other men, and the remark of the judge in his address to the jury that he could not have heard the cars was a reasonable suggestion. I think it fell within the class of cases

which I have mentioned, of an act so eminently suggestive of dangerous consequences, that when we find that an accident has actually occurred, it is reasonable, *prima facie*, to refer it to the conduct of the defendants' servants without requiring further proof.

*Second.* Upon the question whether there was error in the instruction that in order to exonerate the defendants on the ground of negligence on the part of the deceased, it must be such as directly contributed to the accident, I concur in the reasoning of Judge Strong in the case of Button against these defendants, before referred to. I do not see that the term used was particularly significant; but as there was no conceivable negligence which could be imputed to the deceased which would operate remotely, or collaterally, or otherwise than directly, I am of opinion that the jury were not misled. The attention of the judge was not specially called to the expression, as in the case of Button *v.* Hudson River R. R. Co., 18 N. Y. 248. In Tuff *v.* Warman, 2 C. B. N. S. 740, affirmed 5 C. B. N. S. 573 (1), which was the case of a collision between two vessels, and the alleged negligence of the plaintiff was in not keeping a look-out and porting his helm when he found himself in danger of meeting the defendant's vessel, the judge charged the jury that if they were of opinion that the plaintiff by his own negligence directly contributed to the accident, they must find for the defendant; but that if they thought that the defendant directly caused the injury, they must find for the plaintiff. Much of the discussion on the motion for a new trial turned upon the use of the word "directly;" the defendant's counsel contending that the instruction should have been that the plaintiff could not recover if he in any way contributed to the accident. The court, however, held in substance that the only way in which the imputed negligence could operate was direct, and that the instruction could not mislead, and a new trial was refused.

1. In Tuff *v.* Warman, 5 C. B. N. S. 573, it was held that in all cases of collision, the question is whether the disaster was occasioned wholly by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the disaster by his own negligence, or want of ordinary and common care, that but for his default in this respect the disaster would not have happened; in the former case he recovers; in the latter not. Also, if the defendant might, by the use of ordinary care, have avoided the consequences of the plaintiff's mere negligence, the plaintiff is to recover. (Affirming same case, 3 C. B. N. S. 740.)

*Lastly.* In that part of the charge which relates to the degree of care required from the respective parties, the judge was not led to speak of the distinction between the duty which a carrier of persons owes to his passengers and that which persons outside the carriage are entitled to claim from the carrier, but he was calling the attention of the jury to the peculiarities of the case before them. He did not in my opinion overstate the obligations which attach to persons running cars in the night over a course which is also a public street, in saying that they were bound to exercise the utmost care and diligence, and to use all the means and measures of precaution which the highest prudence could suggest. The degree of care required from persons driving vehicles upon a thoroughfare varies according to the circumstances of the case, and is proportioned to the danger to be apprehended of inflicting injury upon others. The rule which would apply to ordinary carriages on common roads would be quite inadequate as a test of that required from the managers of railroads. *Kelsey v. Barney*, 2 Kern. (12 N. Y.) 425 (1); *Hegeman v. Western R. R. Corp.*, 3 Kern. (13 N. Y.) 9 (2).

As to the party injured the rule is that he must have conducted with ordinary care and prudence, but he also must have regard to the particular circumstances of the case, and one who has a right to go across or upon a railroad track must exercise quite another sort of vigilance than a man who travels on a common road. This is what the judge meant when he instructed the jury that the question was whether the deceased used that care and foresight which men of ordinary prudence would probably employ when placed in like circumstances. The defendants had no cause to complain of that instruction.

These views, if concurred in, will lead to an affirmance of the judgment of the Superior Court.

SELDEN, J., was absent; S. B. STRONG, J., doubted whether there could be a presumption in this case that the defendant used any care whatever, and was disposed to reverse; all the other judges concurring.

Judgment affirmed.

1. *KELSEY v. BARNEY*, 12 N. Y. 425, was an action for damages caused by collision between vessels, where it was charged that to entitle plaintiff to recover he must show negligent management of defendant's vessel; judgment on verdict for defendants was affirmed.

2. *HEGEMAN v. WESTERN R. R. CORP.*, 13 N. Y. 9 (9 Am. Neg. Cas. 609, n.), was an action for damages for injuries to plaintiff's hip, caused by derailment of train; judgment for plaintiff for \$9,900 affirmed. (Affirming same case, 16 Barb. 353.)

## DYER v. ERIE RAILWAY COMPANY.

*Court of Appeals, New York, November, 1877.*

[Reported in 71 N. Y. 228.]

**DUTY OF RAILROAD COMPANY AT CROSSING.** — An obligation devolves upon railroad corporations to warn persons who may be passing, whether on foot or in a team, of the approach of trains at a crossing, so that such persons may use the necessary caution to avoid the danger and keep out of the way of the train.

**SIGNALS — STATUTE.** — It is not enough, in all cases, that the statutory signals have been given to absolve a railroad corporation from the charge of negligence.

**SIGNALS — ERRONEOUS INSTRUCTION.** — It is error to submit to the jury, without limitation, the question as to what signals defendant should have given in a particular case.

**PERSON RIDING IN WAGON INJURED IN COLLISION AT CROSSING — NEGLIGENCE OF DRIVER NOT IMPUTABLE TO TRAVELER.** — Where plaintiff rode in a wagon at the driver's invitation, the latter having entire control over it, the negligence of the driver was not imputable to the plaintiff, and contributory negligence of the driver will not bar recovery in action by plaintiff for injuries sustained in a collision between train and wagon, where plaintiff is free from negligence (1).

**JUMPING FROM WAGON TO AVOID COLLISION — CONTRIBUTORY NEGLIGENCE — INSTRUCTION.** — It was not error to charge that if defendant was negligent and the plaintiff was not guilty of contributory negligence, the plaintiff's jumping from the wagon to avoid danger of collision with train at crossing, even if he made a mistake, would not prevent a recovery against defendant.

**APPEAL** from judgment of the General Term of the Supreme Court, in the Fourth Judicial Department, in favor of plaintiff, entered upon an order denying a motion for a new trial and directing judgment on a verdict.

**ACTION** brought to recover damages for injuries alleged to have been sustained through defendant's negligence. The facts appear in the opinion. *Judgment reversed.*

GEORGE GORHAM, for appellant.

J. H. WARING, for respondent.

**Miller, J.** — The plaintiff received the injuries complained of while crossing defendant's track in a public thoroughfare, in the village of Salamanca. At the time he was riding by the permission and invitation of one Stimpson, the owner of the horses and

1. See NOTE ON IMPUTED NEGLIGENCE, in 11 Am. Neg. Cas. 151-156.

wagon driven. A single board was placed upon the wagon, between the forward and hind wheels, Stimpson being near the forward end driving, and the plaintiff near the back end. There was evidence showing that there were buildings near the track which intercepted the view of it and prevented the plaintiff or Stimpson from seeing a train which had been standing south of the buildings, which at this time had started to back over the crossing, as was claimed, without giving Stimpson or the plaintiff any warning of its approach. The horses became frightened by the blowing off of steam of engines in the vicinity, increased their speed, became unmanageable, and the plaintiff was thrown, or jumped from the wagon and was injured by the train which was backing.

The defendant seeks a reversal of the judgment in this action for errors in the instructions given by the judge in his charge to the jury, as well as a refusal to nonsuit the plaintiff. The most serious questions arise upon exceptions to the charge, and these will first be considered. The first one is, that "it was the duty of the defendant, by proper signals, and in a manner that would communicate to the citizen who was about to approach the crossing, that they were approaching, and give this notice in time, so the traveler could seek a place in safety, if he was on foot, and could avoid the danger; and if he had a team attached to a wagon in which he was riding, as in this instance, he would have an opportunity to stop his team in the place of safety."

There can be no serious question that an obligation devolves upon railroad corporations to warn persons who may be passing, whether on foot or in a team, of the approach of trains, so that such persons may use the necessary caution to avoid the danger and keep out of the way of the train. This portion of the charge did not, in any way, require a greater degree of vigilance or a greater exercise of care than ordinarily devolves upon corporations of this character, and anything less than what was embraced in the proposition laid down would have been of no avail. It did not assume that proper precautions had not been taken, or proper signals given, or withhold from the jury a full consideration of that question and the evidence bearing upon the same. It is not enough, in all cases, that the statutory signals have been given to absolve a railroad corporation from the charge of negligence. Other precautions may be required under some circumstances, and there may be negligence which will charge

the company besides the omission to sound the whistle or ring the bell. *Weber v. N. Y. Central & Hudson River R. R. Co.*, 58 N. Y. 451; *Eaton v. Erie R. Co.*, 51 N. Y. 544; *Richardson v. N. Y. Central R. R. Co.*, 45 N. Y. 846 (1). These cases are directly in point, and there is no such distinction between them and the one at bar as to render them inapplicable; nor do we think that the language of the judge will bear a construction that it authorized the jury to determine what precautions were necessary, and that such precautions had not been observed. It is equally manifest that the judge, in this portion of the charge, did not intend to direct the jury that the company would be liable because a signal given had not been communicated to a traveler so as to warn him of approaching danger, and enable him to avoid and escape the same. In this respect, all that was charged was to the effect that proper signals should be given in such a mode, and with such noise or manifestations as that a person might hear if he had given attention; and it did not hold that when thus given, if by reason of any obstruction, or for any other cause they were not heard, that the defendant was negligent. The rule, as laid down, was a correct statement of the law, and not liable to any legal objection.

The next exception made by the defendant's counsel was to the proposition that it was for the jury to determine and decide what signals should have been given at this time. To which exception the judge responded: "You are to decide whether the bell was rung, and if it was rung, whether it gave sufficient notice to passengers who were approaching," and the defendant's counsel then excepted to the proposition whether the ringing of the bell was sufficient notice. If any portion of the charge last

1. In *WEBER v. N. Y. CENTRAL & H. R. R. Co.*, 58 N. Y. 451, it appeared that plaintiff while driving across crossing at night, was struck by backing train; plaintiff's testimony was that no signal was given; defendant offered evidence that plaintiff was warned to stop by employee swinging lantern on rear car; judgment for plaintiff for \$2,200 reversed, it being held that defendant was not bound to take precautions to prevent persons crossing track when trains are approaching.

In *EATON v. ERIE R'Y CO.*, 51 N. Y. 544, plaintiff's horse and wagon injured

in collision with train at street crossing, verdict for plaintiff was affirmed, it being for jury to determine whether plaintiff was negligent in crossing behind train, the engine of which was a long way off, after being warned that train may back at any moment.

In *RICHARDSON v. N. Y. CENTRAL R. R. Co.*, 45 N. Y. 846, plaintiff's horses and wagon struck by train at crossing, judgment for plaintiff was affirmed, it being held that where signals are not sufficient to warn travelers of approaching trains, the railroad company must adopt other precautions.

referred to, and covered by the exception, submitted to the jury for their determination what signals in their opinion were necessary and should have been given, then it was clearly erroneous. In *Beisiegel v. N. Y. Central R. R. Co.*, 40 N. Y. 9 (1), it was held to be error to submit to the jury the question whether the company should keep a flagman stationed at a particular point. Within this decision, it would be equally erroneous to leave to their determination what signals should be required when those which are prescribed by statute were inadequate or inapplicable and of no avail. It, therefore, becomes important to consider whether any such rule is included in the charge.

Immediately after the first proposition we have discussed, the judge in his charge asked the question whether the defendant gave any such proper warning, and made such signals as would usually and ordinarily communicate to travelers situated in the case as the plaintiff was, and said that unless the jury found that the defendant was guilty in this respect, there could be no recovery in the case. He then proceeded to discuss the question whether any signals or notice had been given, referring to the testimony as to the ringing of the bell, and submitted to them whether they believed from the evidence that the bell was rung; and if they did believe it, whether that was a sufficient warning that a man was approaching. He then referred to the duty imposed upon railroad companies to sound the bell and whistle when passing along the line of their road outside of cities and villages at intervals for eighty rods before they reach a crossing, stating that in this instance it could not be complied with, because the car was stationary, "so that this provision of law was not incumbent, and it is not for the defendant to show they sounded a whistle or bell for eighty rods; that they are only to give such other signals as would notify the public of the approach

1. See first appeal in *BEISIEGEL v. N. Y. CENTRAL R. R. CO.*, 34 N. Y. 622; person crossing track; vision obstructed; injured by engine which gave no warning of approach; whether plaintiff observed proper care before attempting to cross track was question of fact, and judgment of nonsuit reversed.

On the second appeal in the *BEISIEGEL* case, 40 N. Y. 9, judgment on


verdict for \$10,000 was reversed; failure of railroad company to keep flagman at crossing not in itself negligence.

See also another appeal in the *Beisiegel* case, 14 Abb. Pr. N. S. 29, where judgment for plaintiff for \$12,000 was affirmed, it being held that where view is obstructed by cars at crossing, and there are several tracks, the question of plaintiff's negligence was for the jury.

of the train, and in this particular case what it should be is for you to decide." Then followed the exception and the response of the judge, and another exception to his answer, as hereinbefore stated.

Taking a cursory view of the entire portion of the charge referred to, perhaps there may be some hesitation whether it was not susceptible of the construction that the judge merely intended to submit to the jury whether the defendant was not negligent in failing to give other signals, or in not doing something more than was done, instead of leaving to their determination what the signals should be. A careful examination of the language employed must, however, lead to a different conclusion. He stated very explicitly that other signals should be given, and in equally clear language conveyed the idea that the jury were to determine the character of such additional signals, and what they should be. It is said that the portion of the charge excepted to may be considered as referring only to signals which might be given on the engine or the train, and none other, and may thus be upheld within the decisions. It is sufficient to say in answer to this suggestion that on its face it was too broad to bear such an interpretation; that it was general in its character, so as to embrace all and every kind of signals which might be given either on the engine or train, or outside of the same, and neither at the time nor when the judge's attention was especially called to it by the exception was the charge restricted or circumscribed in its application, but left without any limitation whatever, so as to warrant the conclusion that all kinds of signals were not intended to be included. At least the jury may have been misled as to the meaning of the judge, and in the exercise of their judgment have required, before arriving at a verdict, that in order to relieve the defendant from the allegation of negligence, that the corporation should have employed a flag-man, or taken some other outside precautions not required by law, or a due and proper regard for the safety of those who might be passing across the railroad track.

The subsequent remarks of the judge do not relieve the portion of the charge excepted to from its objectionable character, and it was not changed or altered thereby in any respect so as to qualify its apparent meaning and purport. It is not necessary to discuss the danger of leaving to the determination of a jury questions which are really of a legal character, which it is the





province of the courts to decide; and it is easy to see that the rights of the defendant might have been seriously affected by the ruling considered. It was clearly erroneous, and for that reason must lead to a reversal of the judgment. As a new trial must be granted on the ground stated, it is well to consider the other questions raised upon the trial. It is insisted that the court erred in charging the jury that the negligence of Stimpson was no bar to the action, and that the negligence of the driver would not prevent a recovery. The solution of the question raised must depend upon the position which Stimpson occupied towards the plaintiff. The plaintiff rode with Stimpson at his invitation gratuitously, in Stimpson's wagon. The latter driving the team exercised entire control over it, and was traveling entirely on business of his own. Stimpson was not hired by the plaintiff, or in his employ, or in any sense his agent, nor had the plaintiff any control, or direction of the team or its management, or over Stimpson himself. There is no pretense but that Stimpson was entirely competent to take charge of the team himself, nor that he did not possess the requisite skill to manage and control the same. It is difficult to see upon what principle the negligence of Stimpson can affect the plaintiff or be imputable to him. It is true that the plaintiff occupies a different attitude from one who is compelled to travel by a train of cars, if he does travel at all (*Chapman v. N. Y. & New Haven R. R. Co.*, 19 N. Y. 341, 9 Am. Neg. Cas. 618 n), and his traveling in the vehicle of Stimpson was entirely voluntary, but that circumstance does not create the relationship of agent and principal, or in any way add to the obligation of the plaintiff to answer for Stimpson's negligence. We have been referred to a number of cases by the learned counsel for the defendant, which it is claimed sustain the theory that the negligence of the driver bars a recovery in an action of this nature, and have given them a critical examination. The most, we think, which can be claimed from any of these decisions is that the question had not been decided and was still open for review. But, however that may be, we think that the principle now involved has been deliberately considered, and put at rest by the recent decision in this court in the case of *Robinson v. N. Y. Central & Hudson River R. R. Co.*, 66 N. Y. 11 (1), and

1. In *ROBINSON v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 66 N. Y. 11, verdict for plaintiff for \$1,750 was affirmed, where plaintiff, riding in buggy at invitation of owner, was injured in collision with train at crossing.

that this case is directly in point. In the case cited a female had accepted an invitation to ride in a buggy with a person who was entirely competent to manage a horse, and it was held that a charge that if defendant was negligent and the plaintiff free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence which contributed to the injury, was proper. The case was distinguished from one where the persons present were engaged in a joint enterprise in the sense of mutual responsibility for each other's acts, as in *Beck v. East River Ferry Co.*, 6 Robt. 82 (1), and the doctrine is laid down that there is no relationship of principal and agent, or master and servant, where one person is gratuitously and voluntarily riding in the vehicle of another. It is not apparent that any distinction exists between the two cases, as in both the plaintiff was a voluntary passenger. It is said that in the case of *Robinson v. N. Y. Central & Hudson River R. R. Co.*, *supra*, the injury was the result of a positive act of negligence, while in the case at bar it was caused by the positive act of Stimpson, the defendant only contributing to it by the omission to take proper precaution. It is difficult to see, even if we assume that Stimpson's act occasioned the result, how it can affect the principle involved, unless it may be assumed that the plaintiff in some way could have prevented it. No such distinct proposition was presented upon the trial to the judge or request made to charge the jury to that effect, and that question, therefore, does not now arise. It was also said, in the opinion in the case last referred to, that none of the authorities cited sanctioned the application of the principle to the facts of that case, and the same rule is applicable here. Within this case, which is decisive against the defendant upon the question considered, there was no error in that portion of the charge last discussed.

There was no error in the charge of the judge to the effect that if the defendant was negligent, and the plaintiff was not guilty of contributory negligence, the plaintiff's jumping from the wagon under the circumstances, even if he made a mistake, would not prevent a recovery. The danger being imminent, the law does not demand that accuracy of judgment which would be required under other circumstances; and the authorities hold

1. *BECK v. EAST RIVER FERRY CO.*, 6 Robt. 82, is distinguished in *Platz v. R. R. Co.*, 5 Daly, 454. *City of Cohoes*, 24 Hun, 101, and fol-

that in such cases an error of this description is not fatal to a recovery, and does not relieve the defendant from liability. *Twomley v. Central Park, North & East River R. R. Co.*, 69 N. Y. 158, 5 Am. Neg. Cas. 217; *Coulter v. American Merchants' Union Ex. Co.*, 56 N. Y. 585 (1); *Buel v. N. Y. Central R. R. Co.*, 31 N. Y. 314, 5 Am. Neg. Cas. 87.

We think that the motion for a nonsuit was properly denied. It is said, in this connection, that the plaintiff was guilty of contributory negligence in not requesting Stimpson to check his horses when approaching the track, and in not looking easterly in the direction of the approaching cars. The judge charged that it was the duty of the plaintiff to look out for himself, and if he was guilty of negligence in not doing this, so as to observe whether a train was approaching, he could not recover. He also charged that it was his duty to look up and down the track as he approached the crossing, and to ascertain by his observation by seeing, if he could, whether a train was approaching; and that as he did not look to the east, the way which the train approached, that it would be negligence, and prevent a recovery if the jury found, as a matter of fact, that if he had looked he could have seen this train approaching in time to give notice to Stimpson, the owner of the team, that there was danger of a collision. The charge made presented the question whether the plaintiff could have seen the train if he had looked; and there was testimony showing that there was a building in the way, which may have obstructed his vision and prevented his seeing; and the jury would have been justified in so finding.

If the plaintiff could not have seen the train, if he had looked in an easterly direction, there would have been no necessity or occasion for his looking there, as it would not furnish him any information which would be of service or aid here in any way in communicating with Stimpson. He could impart nothing to Stimpson which would contribute to prevent the catastrophe, and hence he was under no obligation to request him to check his horses for any such reason.

No distinct request was made to the judge to charge that the plaintiff should have requested Stimpson to check his horses;

1. In *COULTER v. AMERICAN MERCHANTS' UNION EX. CO.*, 56 N. Y. 585, plaintiff striking her head against wall of building in jumping out of way of defendant's horse and wagon which was behind her, judgment for plaintiff for \$175 was reversed on a question of evidence.

and as the charge as made covered the question as to the plaintiff's negligence, in respect to looking, it is not apparent how the circumstances that the plaintiff made no such request to Stimpson, would, of itself, constitute contributory negligence, which would authorize a nonsuit. Nor was there any ground for granting the motion, for the reason that the evidence shows that the bell was rung, and the testimony was sufficiently conflicting to present that question for the determination of the jury. Although the engineer in charge of the train swore that it was, the plaintiff testified that he listened, and did not hear any bell or whistle or noise of the train. This presented a question of fact, and the case is not brought within the principle decided in *Culhane v. N. Y. Central & Hudson River R. R. Co.*, 60 N. Y. 133 (1), that, as against affirmative evidence of credible witnesses of the ringing of a bell, there must be something more than the testimony of one who did not hear, and it must appear that their attention was directed to the fact at the time. The evidence was direct that the plaintiff was giving his attention to the subject, and hence the case cited is not in point.

For the error stated the judgment must be reversed and a new trial granted, with costs to abide the event.

## WILCOX v. NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

*Supreme Court, New York, Fourth Department, July Term, 1895.*

[Reported in 88 Hun, 263.]

### DUTY OF TRAVELERS AND RAILROAD COMPANIES AT CROSSINGS.

— Although a party is bound to make all reasonable efforts to see, when approaching a crossing, that a careful prudent man would make in like circumstances, his failure to see an approaching train does not, of itself, discharge the railroad company from liability for negligence on its part in omitting the statutory signal.

*Following Greany v. Long Island R. R. Co.*, 101 N. Y. 419, 423 (2).

1. In *CULHANE v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 60 N. Y. 133, plaintiff's horse killed by locomotive at crossing, judgment for plaintiff was reversed. The point decided is stated in the opinion of the case at bar.

2. In *GREANY v. LONG ISLAND R. R.* Co., 101 N. Y. 419 (1886), where plaintiff was injured by a train at a crossing, and it appeared that he had used some care and caution in looking for a train approaching before crossing track, the question of his negligence was one of fact for the jury to determine, and judgment for \$6,000 was affirmed.

**NONSUIT — PRACTICE — COLLISION BETWEEN TRAIN AND VEHICLE AT CROSSING.**— It is error to grant a nonsuit if by any allowable deduction from the fact proved a cause of action might be sustained by the plaintiff; a nonsuit is only to be upheld where plaintiff's contributory negligence is established by conclusive evidence.

So *held*, in action for damages for personal injuries sustained by plaintiff in collision of train with omnibus he was driving over street crossing (1).

*Following Greany v. Long Island R. R. Co.*, 101 N. Y. 419, 423.

APPEAL by defendant railroad company from a judgment of the Supreme Court in favor of plaintiff, entered in the office of the clerk of the county of Chemung on November 11, 1889, upon the verdict of a jury rendered after a trial at the Chemung Circuit, and also from an order entered in said clerk's office on December 20, 1894, denying the defendant's motion for a new trial made upon a case containing exceptions. *Judgment affirmed.*

"Plaintiff alleged in the complaint that on June 9, 1888, in the city of Elmira, while he was upon Water street, he received injuries occasioned by the negligence of defendant in operating its train of cars, and that he was free from contributory negligence at the time of receiving the injuries, and it is alleged in the complaint that 'on the morning of the said 9th of June the defendant, in violation of its duties, negligently failed and omitted to guard the said Water street crossing in any proper manner, and negligently failed and omitted to warn travelers upon said street of the approach of the passenger and express train above referred to.' And it is specifically alleged that the defendant failed and omitted to ring the bell on the locomotive of the passenger and express train at the proper distance from the said Water street crossing and to keep the same ringing, and neglected to sound the whistle attached to the locomotive of said passenger and express train upon crossing Water street. It is also alleged that the plaintiff was a driver upon an omnibus connected with one of the hotels in the city, and that while in the line of such employment he was engaged in driving the omnibus down Water street and was obliged to pass over the tracks of defendant's railroad where the same crossed Water street, and that while he was attempting to cross defendant's tracks the omnibus which he was driving was struck by the defendant's passenger and express train and the plaintiff was violently thrown

1. See notes of New York cases, at between trains and vehicles at crossings. end of this case, relating to collisions

therefrom and received the injuries particularly detailed in the complaint and in the evidence given at the trial. The answer of the defendant consists simply of denials of certain allegations of the complaint. When the plaintiff rested no motion for a nonsuit was made, but after the defendant's evidence was in a motion for a nonsuit was made on the grounds, first, that no evidence of negligence has been shown on the part of the defendant; second, that the plaintiff was guilty of negligence which contributed to the accident.' The motion was denied and an exception taken.' Further facts appear in the opinion.

D. C. ROBINSON, for appellant.

BACON & ALDRIDGE, for respondent.

**Hardin, P. J.** — Appellant's learned counsel contends that the evidence was insufficient to warrant the submission of the question of the defendant's negligence to the jury. Plaintiff when injured was driving an omnibus from the depot towards the hotel, about six o'clock in the morning of the 9th of June, 1888, and while crossing the tracks of the defendant, where they intersect Water street in the city of Elmira, the approaching train of the defendant collided with the omnibus and caused the plaintiff to receive the injuries of which he complains. There are some buildings which obstruct a person's view while passing down Water street from the west until within about fifteen feet of the east-bound track, and the defendant has a bridge built in spans with iron girders over the river, through which bridge the trains of the defendant pass on approaching Water street, and a person, in order to observe an approaching train from the east, is required to be very near the tracks of the defendant. At the time the injury occurred there was no flagman at the crossing, nor were the gates operated. It appears by the evidence that the plaintiff stopped his team and looked and listened and did not discover any train, and he started on and was struck by the train approaching on the west-bound track. There was some evidence tending to indicate that the train was running at a high rate of speed. The witness Parker says, in speaking of the speed, that it was "between forty-five and fifty miles an hour" when it passed him, and that he stood in the lane between Henry and Hudson streets about 100 feet from the railroad track. Chalker, who was with the plaintiff at the time of the collision, riding on the steps of the Rathbun omnibus, says: "The train was running rapidly." The witness Tubbs, who saw the accident, says the train was

"running rapidly." The witness Banchier, who was near the corner of Main and Water streets when the accident occurred, testified that the train "was going very rapidly; \* \* \* when I say the train was running very rapidly, I mean very fast. I mean I don't know how many miles an hour, but more rapidly than I have seen trains run through that crossing." The policeman, Powell, testified that the train was moving very rapidly. The witness Fitch testified that he saw the accident, and that the train was "going so fast it could not stop quick." There was evidence given tending to show that at the time, and prior to the accident, the bell was not rung or the whistle sounded. The plaintiff testified: "I didn't hear the bell ringing. All I mean to say is that I didn't hear any bell. I didn't hear any train at all until it came out the end of the bridge, and I saw it, and no whistle." The witness Houts, who had turned down Water street and who saw the train strike the plaintiff's omnibus, says: "I didn't hear the train coming up to the time that it struck him. \* \* \* Then they rang the bell. I heard no whistle blown. I saw the train strike the 'bus. I should say the train was running very rapidly. It struck the 'bus in the rear." The witness Parker says he heard the train below Henry street, and adds: "What I mean to say is the bell was not ringing when it passed me. I was two blocks from the railroad bridge at the time the train passed me, over 1,200 feet south of the bridge. I was going in the direction of the train." The witness Chalker testified: "I didn't hear a bell or anything else." The witness DeGroat testified that he was on the east side of the railroad near the space going down under the bridge in front of Tuch & Taylor's store, and that he saw the 'bus coming down Water street, and that he stopped there and looked on the bridge. The witness adds: "I heard no bell rung or whistle blown on the train as it came along over the bridge. I stood there listening. There was no bell rung on the bridge." The witness Tubbs testified that he saw the plaintiff drive down to the crossing within a short distance of the track, and that he stopped and looked both ways to see if he could see a train, and not seeing any, he started on, and the horse had got on the west-bound track. The witness adds: "And I saw the train coming out of the bridge. \* \* \* When I stood there looking at the 'bus I didn't hear any train of cars coming or see any. \* \* \* It was very foggy on the bridge that morning. The fog hid the

approach of the train coming over the bridge from my view about half-way across the bridge, I should think." The police officer, Powell, testified: "I heard nothing but the crash of the 'bus; didn't hear any bell rung or whistle blown;" and this witness adds that it was very foggy on the bridge. The witness Fitch, who saw the crash, testified: "I heard no whistle blown or rung." In contradiction of the evidence offered by the plaintiff on the subject of the ringing of the bell or sounding of the whistle, the defendant called its engineer and Clark, the fireman, who testified that he had himself rang the bell, and also produced the testimony of Mosher, the brakeman, who testified he heard the bell ringing, and also the testimony of Shirley and of Shephard and of Buckley, and when their evidence is looked into, it is found to be in opposition to, and in contradiction of, the testimony offered by the plaintiff on the subject of whether the bell was rung or the whistle sounded.

The rule laid down in *Culhane v. N. Y. Central & Hudson River R. R. Co.*, 60 N. Y. 133 (1), was reviewed and explained in *Greany v. Long Island R. R. Co.*, 101 N. Y. 419 (2). According to the doctrine laid down in the *Greany* case, we think the trial judge was correct in receiving the evidence produced by the plaintiff tending to show that the bell was not rung or the whistle sounded, and that after the evidence contradicting the testimony of the plaintiff's witnesses was received, the trial judge committed no error in holding that a question of fact was presented for the consideration of the jury in respect to whether the bell was rung or whistle sounded, and reasonable precaution taken by the defendant on the occasion of the injuries occurring. Where similar conflicting evidence was made the subject of review in *Greany v. Long Island R. R. Co.*, 101 N. Y. 423, in the course of the opinion therein delivered by Danforth, J., it was said: "A jury must ascertain. An appellate court cannot say that the testimony of either should be rejected. Nor should a trial judge be required to determine its weight, or the fact which it did or did not ascertain, if it has any legal effect." In the

1. In the *Culhane* case, 60 N. Y. 133, where plaintiff's horse was killed at crossing, judgment for plaintiff was reversed. See note of this case in this volume of AM. NEG. CAS, page 355, *ante*.

The rule in the *Culhane* case, *supra*,

was applied in *McKeever v. N. Y. Central etc., R. R. Co.*, 88 N. Y. 667, person killed at crossing.

2. See abstract of the *Greany* case, 101 N. Y. 419, appended as note to syllabus of case at bar, page 355. *ante*.



course of the charge the trial judge carefully presented the questions of fact, as they were developed by the evidence in respect to the defendant's negligence, to the jury in as favorable language as, in our opinion, the defendant was entitled to have employed.

It is contended by the appellant that "there is certainly sufficient proof of the plaintiff's contributory negligence to bar his recovery as matter of law." It is apparent from the evidence that he was "very thoroughly familiar with all the dangers and circumstances of this crossing and of the manner in which it was operated." However, upon looking into his testimony and the testimony of the witnesses who detailed the facts and circumstances attending the collision, we are of the opinion that the question of whether the plaintiff exercised reasonable care and caution in approaching the tracks at the time of the injuries was a question for the jury to determine. In the case of *Greany v. Long Island R. R. Co.*, 101 N. Y. 419, it was held that, although a party is bound to make all reasonable efforts to see, when approaching a crossing, that a careful, prudent man would make in like circumstances, "his failure to see an approaching train does not of itself discharge the company from liability for negligence on its part in omitting the statutory signal." And in the course of the opinion it was said: "It would be error for a trial court to grant a nonsuit if by any allowable deduction from the facts proved a cause of action might be sustained by the plaintiff, and when such ruling has been upheld by reason of the contributory negligence of the person injured, it appeared that such negligence was conclusively established by evidence which left nothing either of inference or of fact in doubt or to be settled by a jury." Citing *Massoth v. Del. & Hudson Canal Co.*, 64 N. Y. 524 (1). (See also *Chisholm v. State*, 141 N. Y. 246; *Mills v. Brooklyn City R. R. Co.*, 10 Misc., 1; *McPeak v. N. Y. C. & H. R. R. Co.*, 85 Hun, 107, and cases cited.)

Perhaps if the jury had followed implicitly all the facts and circumstances disclosed in the testimony of Tanner and Shephard, a different result might have been reached, but it must be

1. In *MASSOTH v. DELAWARE & HUDSON CANAL CO.*, 64 N. Y. 524 (1876), where plaintiff's intestate, riding on hay wagon driven by another, was killed in collision between wagon and train at crossing, judgment for plaintiff for \$4,000 was affirmed; held that court properly refused to charge that presumption was that the deceased did not look for approaching train.

borne in mind that it was the province of the jury to weigh and consider the facts and circumstances disclosed in the testimony of those witnesses in connection with the facts and circumstances disclosed in the testimony of the other witnesses. In fine, it was for the jury to determine whether the plaintiff had exercised reasonable care and caution under the circumstances disclosed by the whole evidence before them.

No other questions are made by the learned counsel for the appellant, and it, therefore, follows from the views already expressed that the verdict should be sustained.

MARTIN and MERWIN, JJ., concurred.

Judgment and order affirmed, with costs.

#### COLLISIONS BETWEEN TRAINS AND VEHICLES AT RAILROAD CROSSINGS.

Among the numerous New York cases arising out of accidents at railroad crossings in which persons driving across tracks were injured in collisions with trains (other than the cases reported in this volume of AM. NEG. CAS.), are the following decisions in the Court of Appeals and Supreme Court:

##### **Collisions at railroad crossings**

##### *Killed while driving over crossing — Obstruction.*

MACKAY *v.* N. Y. CENTRAL R. R. CO., 35 N. Y. 75, plaintiff's intestate killed by train while driving over crossing; obstruction on track; held that where obstruction was placed by railroad company it was not negligent in person to drive slowly over track without stopping; judgment for plaintiff for \$4,500 affirmed.

##### *Collision between stage and freight train.*

OWEN *v.* HUDSON RIVER R. R. CO., 35 N. Y. 516, collision between plaintiff's stage and defendant's freight cars; judgment absolute for defendant.

##### *Killed at crossing.*

RENWICK *v.* N. Y. CENTRAL R. R. CO., 36 N. Y. 132, plaintiff's intestate, while driving over crossing, struck by train at crossing; judgment for plaintiff for \$1,600 affirmed.

DAVIS *v.* N. Y. CENTRAL & HUDSON RIVER R. R. CO., 47 N. Y. 400, killed while driving over crossing; judgment for plaintiff.

##### *Collision between sleigh and train — Contributory negligence.*

GRIPPEN *v.* N. Y. CENTRAL R. R. CO., 40 N. Y. 34, plaintiff's

intestate driving sleigh across track on stormy night killed at crossing; judgment for plaintiff for \$4,000 reversed, the failure of railroad to ring bell not being negligence; if the injury could have been avoided by deceased looking before he reached the crossing for approaching train, his omission to look was negligence.

*Collision between sleigh and train at crossing.*

SALTER *v.* UTICA & BLACK RIVER R. R. Co., 59 N. Y. 632, plaintiff's intestate driving sleigh over crossing, with ears muffled on cold day, killed in collision with train; judgment for plaintiff for \$3,875 reversed for erroneous admission of certain evidence.

On second appeal in the SALTER case, 75 N. Y. 273, judgment for plaintiff for \$5,000 was reversed on ground of negligent driving of person killed.

See also subsequent appeal in the SALTER case, 86 N. Y. 401.

See also final appeal in the SALTER case, 88 N. Y. 42, where judgment for plaintiff for \$4,500 was affirmed.

*Wagon struck by train.*

WARNER *v.* N. Y. CENTRAL R. R. Co., 52 N. Y. 437, wagon struck by train at crossing and person thrown out and injured; judgment for plaintiff affirmed.

*Driving across track at night.*

CARR *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 60 N. Y. 633, plaintiff driving over crossing at night struck by train and horse injured; judgment for plaintiff affirmed.

*Killed at farm crossing.*

CORDELL *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 64 N. Y. 535, plaintiff's intestate killed at farm crossing; judgment for plaintiff for \$3,000 reversed; error to charge that failure to signal was negligence as farm crossing was not a traveled public road at which statute required signals to be given.

See also second appeal in the CORDELL case, 70 N. Y. 119, where judgment for plaintiff for \$5,000 was reversed for erroneous instruction as to obstruction near crossing.

On a third appeal in the CORDELL case, 75 N. Y. 330, judgment for plaintiff was reversed on the ground that nonsuit should have been granted.

See final appeal in the CORDELL case, 79 N. Y. 636, where judgment for plaintiff for \$5,000 was affirmed.

*Collision with train at street crossing.*

DOLAN *v.* DELAWARE & HUDSON CANAL Co., 71 N. Y. 285, driving across track at city crossing and struck by train; judgment for plaintiff for \$2,000 affirmed.

SHAW *v.* JEWETT, RECEIVER, 86 N. Y. 616, collision at street crossing between train and wagon; judgment for plaintiff for \$2,360 affirmed.

*Driving slowly over crossing and killed by train.*

KELLOGG *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 79 N. Y. 72, person driving at slow trot on crossing, without stopping; struck and killed by train; judgment for plaintiff for \$3,000 affirmed.

*Driving in front of approaching train — Contributory negligence.*

CONNELLY *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 88 N. Y. 346, driving across track in front of approaching train and killed in collision with train; contributory negligence; judgment for plaintiff reversed.

*Gates raised at crossing — Person driving struck by train.*

GLUSHING *v.* SHARP, RECEIVER, 96 N. Y. 676, gateman at crossing having raised gate plaintiff drove across and his horse was killed by train; judgment for plaintiff affirmed.

KANE *v.* N. Y., NEW HAVEN & HARTFORD R. R. Co., 132 N. Y. 160, gates raised at crossing and plaintiff driving over track struck by train; judgment for \$2,000 affirmed.

*Driving across track and struck by train — Intoxication.*

TOLMAN *v.* SYRACUSE, BINGHAMTON & N. Y. R. R. Co., 98 N. Y. 198, person under influence of liquor, driving across track and killed in collision at crossing; judgment for plaintiff reversed.

*Driving rapidly over crossing in snowstorm — Nonsuit.*

POWELL *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 109 N. Y. 613, person driving across track through snow storm at rapid rate, struck by train at crossing; nonsuit affirmed.

*Horses killed at crossing — Obstructed view.*

THOMPSON *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 110 N. Y. 636, horses killed by train at crossing; driver looked both ways but boy in front of his horses just before he crossed; nonsuit reversed.

*Failure to look for train at crossing — Nonsuit.*

CULLEN *v.* DELAWARE & HUDSON CANAL Co., 113 N. Y. 667, collision at crossing; failure of person driving to look for train; nonsuit affirmed.

*Collision at private crossing — Fast driving.*

NASH *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 125 N. Y. 715, driving at trot over private crossing; collision with train; judgment for plaintiff for \$2,000 reversed.

*Driving stock across track — Killed at crossing — Contributory negligence.*

MORRIS *v.* LAKE SHORE & MICHIGAN SOUTHERN R'y CO., 148 N. Y. 182, person driving stock over track struck and killed at farm crossing; person putting himself in danger for purpose of saving his property; contributory negligence; judgment for plaintiff reversed (79 Hun, 611, *mem.*, reversed).

*Collisions between vehicles and trains at crossings.*

See also the following New York cases arising out of collisions at crossings:

Sheffield *v.* Rochester & S. R. R. Co., 21 Barb. 339; Dascomb *v.* Buffalo R. R. Co., 27 Barb. 221; Mulligan *v.* N. Y. Central & Hudson River R. R. Co., 136 N. Y. 567, affirming 11 N. Y. Supp. 452; Crandell *v.* Lehigh Valley R. R. Co., 151 N. Y. 642, affirming 72 Hun, 431; Durkee *v.* Del. & Hud. Canal Co., 88 Hun, 471; Belch *v.* N. Y. Central & Hudson River R. R. Co., 90 Hun, 477; Allen *v.* N. Y. Central & Hudson River R. R. Co., 92 Hun, 589; Morse *v.* Erie R'y Co., 65 Barb. 490; Foran *v.* N. Y. Central, etc., R. R. Co., 64 Hun, 510; Sykes *v.* Del., Lack. & W. R. R. Co., 25 Hun, 61; Hickey *v.* N. Y. Central, etc., R. R. Co., 8 App. Div. 123.

*Persons riding in vehicles — Imputed negligence.*

*Collision with train at crossing — Person riding in wagon killed — Speed ordinance.*

BROWN *v.* BUFFALO & STATE LINE R. R. Co., 22 N. Y. 191, plaintiff's intestate, while riding in wagon killed at defendant's crossing; speed of train in violation of ordinance; judgment for plaintiff for \$4,500 reversed for erroneous charge that if the train was running in violation of ordinance and the injury was occasioned by such act, defendant would be liable, it being held that violation of city ordinance is not in itself evidence of negligence.

*Collision between stage and train making running switch.*

BROWN *v.* N. Y. CENTRAL R. R. Co., 32 N. Y. 597, plaintiff riding in stage, injured by stage being struck at crossing by train making running switch; failure to give warning; judgment for plaintiff for \$500 affirmed.

See also STILLWELL *v.* N. Y. CENTRAL R. R. Co., 34 N. Y. 29, action arising out of same accident as the Brown case (preceding paragraph); judgment for plaintiff for \$1,016 affirmed.

*Riding in covered vehicle — Negligence of driver imputed to person riding.*

MCCALL *v.* N. Y. CENTRAL, ETC., R. R. Co., 54 N. Y. 642, plaintiff's intestate, while riding in covered vehicle thrown from same

which was struck by engine at crossing; negligence in permitting driver to drive rapidly across track without taking proper precautions at crossing; judgment for plaintiff for \$4,000 reversed.

*Riding in wagon by invitation — Defective crossing.*

MASTERSON *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 84 N. Y. 247, person riding in wagon by invitation of driver, thrown out of wagon and killed; defective crossing; railroad liable; judgment for \$4,000 affirmed.

*Riding in wagon by invitation — Collision with train.*

COSGROVE *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 87 N. Y. 88, person riding in wagon on invitation, killed in collision with train at crossing; nonsuit reversed.

*Person riding in vehicle driven by another killed in collision.*

HOAG *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 111 N. Y. 199, woman, being driven by her husband, killed in collision at crossing; question of imputed negligence; nonsuit reversed.

*Collision at crossing — Person riding in wagon injured — Nonsuit.*

BRICKELL *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 120 N. Y. 290, person riding in buggy with driver hired by him, injured in collision at crossing; nonsuit affirmed.

**Defective crossings.**

*Farm crossing.*

SMITH *v.* N. Y. & O. M. R. R. Co., 63 N. Y. 58, woman crossing in a cutter over farm crossing on her own land thrown out of vehicle by reason of defective track; judgment for plaintiff for \$185 affirmed.

*Defective plank at crossing.*

GALE *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 76 N. Y. 594, defective plank at crossing; accident to person driving wagon; judgment for plaintiff for \$14,000 affirmed.

PAYNE *v.* TROY & BOSTON R. R. Co., 83 N. Y. 572, plaintiff's horse, driven slowly over crossing, injured by foot catching in defective planking; nonsuit reversed.

*Horse frightened — Defective crossing.*

REMBE *v.* N. Y., ONTARIO & WESTERN R. R. Co., 102 N. Y. 721, horse frightened and wagon upset at defective crossing and person driving injured; judgment for plaintiff for \$500 affirmed.

*Defective crossing.*

HOYT *v.* NEW YORK, LAKE ERIE & WESTERN R. R. Co., 118 N. Y. 399, defective crossing; injury to person driving; judgment for plaintiff reversed.

*Defective crossings.*

See also the following cases: *France v. Erie R. R. Co.*, 2 Hun, 513; *Cornell v. Skaneateles R. R. Co.*, 15 N. Y. Supp. 587; *Currier v. Ogdensburg, etc., R. R. Co.*, 6 N. Y. Supp. 615, 127 N. Y. 653; *Leopold v. Del. & Hud. Canal Co.*, 74 Hun, 137; *Prince v. N. Y. Central & Hudson River R. R. Co.*, 14 N. Y. Supp. 817; *Cotton v. N. Y., Lake Erie & W. R. R. Co.*, 20 N. Y. Supp. 347.

**Horses frightened.***Horse frightened by whistle at crossing.*

*VOAK v. NORTHERN CENTRAL R. R. Co.*, 75 N. Y. 320, plaintiff approaching crossing thrown out of buggy she was driving by reason of horse becoming frightened by sound of whistle of locomotive at crossing; judgment for plaintiff for \$2,000 affirmed.

*Horse frightened by train — Defective crossing.*

*WASMER v. DELAWARE, LACKAWANNA & WESTERN R. R. Co.*, 80 N. Y. 212, person killed trying to rescue his horse and wagon, horse being frightened by train, and track being defective; judgment for plaintiff for \$1,250 affirmed.

*Horse struck by gate at crossing.*

*PHILLIPS v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 127 N. Y. 657, horse frightened by being struck by lowering gate at crossing; person riding in wagon driven by another thrown out and injured; question of imputed negligence; judgment for plaintiff for \$5,000 affirmed.

*Horses frightened — Various causes.*

See also the following cases: *Newsom v. N. Y. Central R. R. Co.*, 29 N. Y. 383; *Van Inwegen v. N. Y., Lake Erie & W. R. R. Co.*, 76 Hun, 53; *Schultz v. N. Y. Central & H. R. R. Co.*, 143 N. Y. 670, affirming 69 Hun, 515; *Borst v. Lake Shore & Michigan Southern R'y Co.*, 66 N. Y. 639, affirming 4 Hun, 346; *Coy v. Utica & S. R. R. Co.*, 23 Barb. 643; *Lenhart v. N. Y., Lake Erie & W. R. R. Co.*, 98 N. Y. 635; *Bell v. N. Y. Central & Hudson River R. R. Co.*, 29 Hun, 560; *Putnam v. N. Y. Central, etc., R. R. Co.*, 47 Hun, 439.

PERSON DRIVING VEHICLE STRUCK AND KILLED BY TRAIN AT STREET CROSSING — IMMINENT PERIL — NEGLIGENCE OF PARTIES FOR JURY. — In *HURLEY, ADM'R, v. NEW YORK CENTRAL & HUDSON RIVER R. R. CO.* (*Supreme Court, New York, General Term, Fifth Department, October, 1895*), 90 Hun, 1, an appeal from judgment for plaintiff, judgment was affirmed, the facts, as stated in the opinion by

BRADLEY, J., being as follows: "In the evening of November 19, 1891, the plaintiff's intestate, in driving a carette on Seneca street, in the city of Buffalo, was killed by a train upon the defendant's road, which crossed the street diagonally in a northeasterly and south-westerly direction. The line of the street is nearly east and west. The deceased was driving east, and had passed over the tracks of the Western New York & Pennsylvania railroad, and stopped between them and the tracks of the defendant's road for an engine moving westerly to pass, and after it passed he drove forward onto the track of the defendant, and his vehicle was struck by a train going northeasterly on the defendant's road, causing his death. The inference was warranted by the evidence that no signal by bell or whistle was given of the approach of the train. The jury were permitted to find that the defendant was chargeable with negligence. The burden was with the plaintiff to prove that his intestate was free from contributory negligence. There was evidence tending to prove that he looked both ways to see whether he could safely cross the track, before he drove upon it. The engine of the train had a headlight and, while it does not very clearly appear that he may not have seen it if he had carefully and continuously looked, there is evidence of circumstances which may have reasonably led him to suppose that he could safely cross when he sought to do so, until he had so far proceeded as to relieve him from the imputation of negligence in entering upon the track. The street is a business one. It is crossed by the Western New York & Pennsylvania railroad tracks westerly of and parallel with those of defendant. The gates at the crossing were, and had been for two or three days, out of repair, and not operated, and a flagman was stationed there. The evidence on the part of the plaintiff is to the effect that when the deceased had driven across the track of the Western New York & Pennsylvania railroad the flagman gave a signal for him to stop, which he did between it and that of defendant, and that immediately after the engine going west passed the flagman gave a signal for him to proceed, and that he did so, with the unfortunate result. The signal to proceed may be deemed to have been something of an invitation to the deceased to go forward, and such assurance as it could furnish that it was safe to do so. Three passengers in the carette saw the headlight of the approaching engine just as the horses were going upon the track, and jumped from the vehicle before the collision; two of them without and the other with some personal injury occasioned by it. The plaintiff's intestate having charge of the team did not abandon the carette. It is evident that he was in a position to see the train momentarily, as did the



passengers, before the collision. But at the time his situation was an emergent one. He had so far proceeded that his position was perilous, and he may not have used the best judgment for his personal safety. He probably may, by the abandonment of his rig, have jumped from the coach, and saved himself. But the conclusion was permitted that the emergency in which he was placed by the negligence of the defendant was such that he was not responsible for failure to use the best or most accurate judgment which may seem to have been available to extricate himself from his perilous position. (*Voak v. Northern Central R'y Co.*, 75 N. Y. 320; *Twomley v. Central Park, etc., R'y Co.*, 69 N. Y. 158; *Dyer v. Erie R'y Co.*, 71 N. Y. 228; *Roll v. Northern Central R'y Co.*, 15 Hun, 496, 80 N. Y. 647.) The questions of negligence on the part of the defendant and of contributory negligence of the plaintiff's intestate were those of fact upon the evidence, and were fairly submitted by the learned trial court to the jury, and it is not seen that the questions arising upon the conflict of the evidence were not properly disposed of by the verdict. None of the exceptions were well taken. The judgment and order should be affirmed." JAMES FRASER GLUCK, appeared for appellant; JOHN CUNEEN, for respondent.

## BUTTON, ADM'X, v. HUDSON RIVER RAILROAD COMPANY.

*Court of Appeals, New York, December, 1858.*

[Reported in 18 N. Y. 248.]

**NEGLIGENCE — BURDEN OF PROOF.** — In an action for negligence, the burden is upon the plaintiff to prove affirmatively that he is guiltless of any negligence proximately contributing to the injury.

**EVIDENCE.** — Such negligence is not to be presumed, and therefore direct evidence to disprove it is not required from the plaintiff in the first instance; but where there is conflicting evidence as to the fact, the preponderance must be with the plaintiff to enable him to recover.

**CONTRIBUTORY NEGLIGENCE — INSTRUCTION — PERSON RUN OVER BY HORSE CAR.** — Where the negligence on the part of the plaintiff, if any existed, was at the very time the injury was incurred, it is error, as misleading the jury, to charge that in order to exempt the defendant, the negligence of the plaintiff must have directly contributed to the injury.

So held, in action for damages for death of plaintiff's husband who was run over and killed by one of defendant's horse cars.

APPEAL from the Superior Court of New York City.

"Action by the administratrix and widow of Thomas Button

for damages for the death of her husband, who was run over and killed by the horse cars of the defendant passing down West street, in the city of New York, at eleven o'clock of the night of November 13, 1853. Upon the trial, before Mr. Justice Slosson, it was proved that Button, the intestate, had been drinking at one or more dramshops during the evening previous to the accident; about five minutes after he left one of them, which was in West street and near the track of the defendant's road, the cars passed and he was killed. His body was found lying straight across the track, the head upon one rail and the legs across the other. The driver of the car which ran over Button testified that he was driving at the rate of four miles an hour; that he could see the leading horses and could have seen a man if standing upon the track; that at the place where the accident took place the leading horses suddenly jumped sideways from the track, and seeing something upon the track, the driver applied the brakes; but before he could arrest the car it had passed over the deceased. There was some evidence tending to show that the car was driven at a higher speed than four miles an hour.

"The judge charged the jury that if there was negligence on the part of the deceased which directly contributed in any degree to bring about the catastrophe, then, although the defendant might have been also guilty of negligence, the verdict must be for the defendant. The defendant is liable only in case the catastrophe was brought about by its own culpable negligence, and without any negligence on the part of the deceased directly contributing to it. The defendant excepted to the use of the word 'directly' in this part of the charge. The judge also charged that if the deceased, strolling there while in a state of intoxication, laid down before the cars, or tumbled down unable to support himself from intoxication, then it was his negligence to which the disaster must be attributed and the defendant must go quit, if the driver did not see him in time to avoid him. The defendant requested the judge to charge that if the deceased was under the influence of intoxicating liquor, and while in that condition got upon the track, and when there was incapable of hearing the approach of the car, or if he was incapable, from any cause, of getting out of the way of the car with ordinary facility, then the deceased was guilty of negligence and the plaintiff cannot recover. The judge refused to charge otherwise than as before stated, and the defendant took an exception. The

defendant further requested the judge to charge that the plaintiff, in order to recover, must establish affirmatively that the deceased was not guilty of negligence. The judge refused so to charge, and the defendant took an exception. Other portions of the charge are stated in the following opinion of Harris, J. The jury found a verdict for the plaintiff, and, in answer to questions submitted to them, found specially: 1. That the death of Button was caused by the negligence of the defendant's servants; 2. that there was no negligence on the part of Button which directly contributed to the accident. The judgment entered on the verdict was, on appeal, affirmed at General Term, and the defendant appealed to this court." *Judgment reversed.*

CHARLES O'CONOR, for appellant.

JONAS B. PHILLIPS, for respondent.

**Strong, J.** — Two points are made for the appellants: First, that the justice, at the trial, erred in instructing the jury, in substance, that negligence of the intestate, to prevent a recovery, must have directly contributed to the injury; and, second, that the justice erred in refusing to charge that it belonged to the plaintiff, in order to maintain the action, to establish affirmatively that the intestate was not guilty of negligence.

In regard to the first point, if there was any negligence on the part of the intestate which contributed to the injury, it consisted of imprudently entering or remaining on the track of the defendants' road, and exposing himself to be crushed and killed by a passing car, as actually happened. Upon the evidence, there is nothing else in the case in respect to which negligence by the intestate, tending to the injury, can be imputed. And assuming that such was the negligence, its influence towards the result was wholly direct; nothing in any way affecting it intervening between them. It was a proximate cause of the consequence which followed. Whether, therefore, as a general proposition applicable to all cases of actions for injuries from negligence, the negligence of the party injured, to preclude a recovery, must have directly contributed to the injury, be sound or not, it would seem to be free from objection as applied to the present case. The use or omission of the word "directly," in stating the doctrine to the jury in this case, if the jury possessed ordinary intelligence, which must be supposed, could not make any practical difference; the negligence of the intestate, if any, could not have operated as a cause of the result otherwise than directly.

The other point presents the question, upon whom was the burden of proof, in reference to negligence of the intestate conducing to the injury — whether it belonged to the plaintiff to prove affirmatively the absence, or to the defendant to prove affirmatively the presence, of such negligence.

In regard to all the circumstances essential to the cause of action, the plaintiff held and was required to sustain the affirmative. Among those circumstances were, that the defendants were negligent, and that the injury resulted from that negligence. If the intestate was negligent, and his negligence concurred with that of the defendants in producing the injury, the plaintiff had no cause of action. The reason why no right of action would exist is, that both the intestate and the defendants being guilty of negligence, they were the common authors of what immediately flowed from it, and it was not a consequence of the negligence of either. The court cannot accurately, and will not undertake to, discriminate between them as to the extent of the negligence of each and the share of the result produced by each, neither, therefore, could allege against the other any wrong, and without a wrong there can be no legal injury. In this view, the exercise of due care by the intestate was an element of the cause of action. Without proof of it, it would not appear that the negligence of the defendants caused the injury.

The cases on this point lead to the same conclusion. In *Butterfield v. Forrester*, 11 East, 60 (1), which was an action for an injury from an obstruction in a street. Lord Ellenborough said: "Two things must concur to support this action — an obstruction in the road, by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." In *Harlow v. Humiston*, 6 Cow. 189, a similar case, Savage, Ch. J., said: "Negligence by the defendant, and ordinary care by the plaintiff, are necessary to sustain the action." The same doctrine is stated in *Rathbun v. Payne*, 19 Wend. 399; see also *Bush v. Brainard*, 1 Cow. 78; *Hartfield v. Roper*, 21 Wend. 615 (2); *Brown v. Maxwell*, 6 Hill, 592; and *Spencer v. Utica R. R. Co.*, 5 Barb.

1. In *BUTTERFIELD v. FORRESTER*, 11 East, 60, it was held that one who is injured by an obstruction in a highway, against which he fell, cannot maintain an action, if it appears that he was riding with great violence and want of ordinary care, but for which he might have seen and avoided the obstruction.

2. See *Hartfield v. Roper*, 21 Wend. (N. Y.) 615, reported in this volume, page 293, *ante*.

337. In *Holbrook and Wife v. Utica & Schenectady R. R. Co.*, 2 Kern. 236, the plaintiffs sued for an injury to the wife, while a passenger on the defendants' cars, and the question arose whether the plaintiff must prove negligence of the defendants, in addition to the fact of the injury; and it was held that the onus as to negligence, and that the injury complained of was caused by the negligence, was on the plaintiffs. In Massachusetts it has been adjudged in several cases that in an action for an injury from negligence the plaintiff must not only prove negligence, but ordinary care on his own part. *Smith v. Smith*, 2 Pick. 621; *Lane v. Crombie*, 12 Pick. 177; *Adams v. Carlisle*, 21 Pick. 146; *Parker v. Adams*, 12 Metc. 415. In Maine and New Jersey the same rule prevails. *Kennard v. Burton*, 25 Me. 49; *Moore v. Central R. R. Co.*, 4 Zab. 824 (1). The English decisions are to the same effect. *Lynch v. Nurdin*, 1 Ad. & El., N. S., 35; *Clayards v. Dethick*, 12 Q. B. 439, 447; *Gough v. Bryan*, 2 Mees. & W. 773; *Bridge v. Grand Junction R. R. Co.*, 3 Mees & W. 247; *Martin v. Great Northern R. R. Co.*, 30 Eng. Law and Eq. 473 (2).

1. *Moore v. Central R. R. Co.*, 4 Zab. 824, is reported in this volume, page 256, *ante*.

2. In *LYNCH v. NURDIN*, 1 Ad. & El., N. S., 35, 4 P. & D. 672, it was held that the rule of law, that a plaintiff who has contributed to an injury occasioned by the negligence of the defendant, cannot recover a compensation in damages, does not apply where the plaintiff is a person incapable of exercising ordinary care and caution. Where, therefore, the defendant's servant left a horse and a cart unattended in a public street, and a child under seven years of age, during his absence, climbed on the wheel, and other children urged forward the horse, whereby he was thrown to the ground, and the wheel fractured his leg: Held, that the jury was justified in finding a verdict for him, if of opinion that there was negligence on the part of the servant. Held, also, that the co-operation of third parties in the injury was not a ground of defense, if the means of injury were

negligently left where it was extremely probable that they would be set in motion.

In *CLAYARDS v. DETHICK*, 12 Q. B. 439, it appeared that the commissioners of sewers had made a dangerous trench in the only outlet from a mews, putting up no fence, and leaving only a narrow passage, on which they heaped rubbish, and a cabman, in the exercise of his calling, attempted to lead his horse out over the rubbish, and the horse fell and was killed, for which loss he brought an action against the defendant as acting under the commissioners. Held, that the plaintiff was not disentitled to recover, because he had at some hazard, created by the defendant, brought his horse out of the stable, and that the case was properly left to the jury on the question, whether or not the plaintiff had persisted, contrary to express warning at the time (as to which there was contradictory evidence), in running upon a great and an obvious danger.

The facts in *GOUGH v. BRYAN*, 2

It must not be understood that it was incumbent on the plaintiff, in the first instance, to give evidence for the direct and special object of establishing the observance of due care by the

*Mees. & W.* 770, 773, were as follows: Case for driving a coach of the defendant against the plaintiff's carriage, in which were two of his sons, and injuring it and them. Plea, stating that the plaintiff's carriage was under the guidance and direction of one of his sons, who was driving it, and that the defendant, by his servant, was carefully and properly driving his coach; that if the plaintiff's son had driven his carriage carefully and properly, no collision would have taken place, nor any injury have been occasioned to the plaintiff's carriage or to his sons; but that the plaintiff's son drove the carriage so negligently and improperly that it ran and struck against the defendant's coach, and by means thereof, and without any carelessness or improper conduct of the defendant by his servant the defendant's coach ran and struck against the plaintiff's carriage, whereby the supposed damages in the declaration mentioned were occasioned; so that if any damage was occasioned to the plaintiff's carriage or to his sons, it was occasioned by the carelessness, negligence, and improper conduct of the plaintiff's son so driving his carriage; without this, that the defendant, by his servant, so carelessly and improperly drove his coach, that by and through his carelessness and improper conduct in that behalf, the defendant's coach struck against the plaintiff's carriage, in manner and form, etc. Held, bad on special demurrer.

*BRIDGE v. GRAND JUNCTION R'Y Co.*, 3 *Mees. & W.* 244, was an action on the case for the negligent management of a train of railway carriages, whereby it ran against another train, in one of which the plaintiff was riding, and injured him. Plea, that the parties hav-

ing the management of the train in which the plaintiff was, managed it so negligently and improperly that, in part by their negligence, as well as in part by the defendant's negligence, the defendant's train ran against the other, and caused the injuries to the plaintiff. Held, that the plea was bad in form, as amounting to not guilty; and in substance, for not showing not only that the parties under whose management the plaintiff was, were guilty of negligence, but also that by ordinary care they could have avoided the consequences of the defendant's negligence.

*MARTIN v. GREAT NORTHERN R'Y Co.*, 30 *Eng. Law & Eq.* 473 16 C. B. 179, was an action against a railway company for so negligently managing and lighting their station that the plaintiff, being a passenger by the railway, was thrown down while on his way to the carriages. At the trial the defendant's counsel having rested his defense on the ground that the accident was entirely owing to the want of ordinary care on the part of the plaintiff, and that there was no negligence on the part of the company, the judge left it to the jury to say whether the accident occurred from the alleged negligence of the company, or whether it was entirely the plaintiff's own negligence which caused it. Verdict for the plaintiff. On a motion for a new trial for misdirection, on the ground that if the plaintiff contributed by his own negligence to the injury, the company was entitled to the verdict, although the company might have been guilty of negligence: Held, that the company was not entitled to a new trial, the issue on which alone they rested their defense having been left to the jury.

intestate; it would be enough if the proof introduced of the negligence of the defendants and the circumstances of the injury, *prima facie*, established that the injury was occasioned by the negligence of the defendants; as such evidence would exclude the idea of a want of due care by the intestate aiding to the result. Ordinarily, in similar actions, when there has been no fault on the part of the plaintiff, it will sufficiently appear in showing the fault of the defendant, and that it was a cause of the injury; and when it does so, no further evidence on the subject is necessary. The fact must appear in some way, but in what particular mode is unimportant. The evidence of it may be direct and positive or only circumstantial. Whatever the nature of the evidence, if there is any conflict as to the fact, there must be a preponderance of proof in support of it, or the action must fail.

In cases like the present it is often of great practical importance that the jury be properly instructed as to the burden of proof, in respect to the care required of the plaintiff to entitle him to recover. The party holding it must do more than make a balanced case on that point. The scales must ultimately turn in his favor. In the present case it is quite clear that the error in the instruction on that subject was a material one, for which there should be a new trial.

In my opinion, the judgment should be reversed and a new trial granted, with costs to abide the event.

**Harris, J.** — The verdict of the jury was clearly against evidence, even as the law was given to them by the judge who presided at the trial. The deceased, when first seen after he left Lyming's oyster saloon, was lying directly across the track, with his head on one rail and his feet on the other. How he came there, or how long he had been there, no witness was able to state. All that was proved was that he had been drinking at the oyster saloon, and had left there but a few minutes before he was found in this position. In view of this state of facts, the jury were told, very properly, that if the deceased, strolling there while in a state of intoxication, had laid himself down before the cars, or had tumbled down, unable to support himself from intoxication, then, unquestionably, it was his negligence to which the disaster was to be attributed; and, if the driver did not see him in time to avoid him, the defendants were not liable. This part of the charge was unobjectionable. If it was his own fault that he was lying on the track in the position in which he

was first discovered, and he was not seen in time to stop the car before it reached him, then the deceased was himself the cause of his own death, and the defendants were blameless. The testimony warranted no other finding.

But then the judge proceeded to open before the minds of the jury a field of conjecture. He stated that the deceased had a right to be where he was found, and the question for the jury was whether he was there through any fault of his own, or whether he was passing over and was knocked down by the cars; that if he was passing prudently and properly across the track, and was run over by the cars, and the defendants had omitted the use of such precautions and care as, if used, would have prevented the disaster, the plaintiff was entitled to a verdict. This part of the charge was erroneous. The testimony presented no such question. The deceased was found lying on the track. It was not the defendants' fault that he was there. All that the court was called upon to do was to instruct the jury as to the rule of law applicable to the case as it was presented by the testimony. But to this part of the charge, though erroneous, there seems to have been no exception.

In another part of the charge the jury were told that the defendants were only liable in case the catastrophe was brought about by their own culpable negligence, and without any negligence on the part of the deceased "directly contributing to produce the catastrophe." To the use of the word "directly" there was an exception. The difficulty with this part of the charge is that it leaves the question vague and indefinite. What were the jury to understand by negligence *directly* contributing to produce the catastrophe? The same form of expression pervades the entire charge. The fact that the deceased was found lying on the track was uncontroverted. There was no evidence to show that it was any fault of the defendants that he was there. It should have been assumed, nothing appearing to the contrary, that it was his own fault. Why, then, ask the jury to say whether "there was any negligence upon the part of the deceased which *directly* contributed to the accident?" There was no such question in the case. The deceased was found lying on the track. This fact was as much the proximate and immediate cause of his death as the fact that the defendants' cars passed over his body. The death was the combined result of both causes. The jury should have been instructed that, this being



the case, the only question for them to decide was whether, by the exercise of reasonable care and prudence, after the deceased was discovered, the driver might have saved his life.

A case quite analogous in principle is found in *Dowell v. General Steam Navigation Co.*, 5 El. & B. 195 (1). In that case there had been a collision between two vessels. The plaintiff's was a sailing vessel and the defendant's vessel a steamer. The collision had taken place at the mouth of the Thames, at night. The plaintiff's vessel had exhibited a light, but had withdrawn it two or three minutes before the collision. The plaintiff's vessel was not seen by those on board the steamer until within two or three lengths of it. It was then impossible to avoid the collision. The jury found, on the one hand, that the sailing vessel was at fault in not continuing the light until the danger was past; and, on the other, that the steamer was going at too great speed for so dark a night. They also said they were much inclined to think the preponderance of blame was with the steamer. It was held, upon very full consideration, that the finding of these facts amounted to a verdict for the defendant. Lord Campbell, in delivering the judgment of the court, said that the jury must be taken to have found that the fault of the vessel, in not showing a light, led to the collision. He adds: "If this was a proximate cause of the collision, however much the steamer might be in fault, the action cannot be maintained." In that case the fault of the plaintiff's vessel consisted in lying in an exposed condition all night without adopting the reasonable precaution of exhibiting a light. In this case the fault of the deceased consisted in his placing himself directly across the railroad track, a position of the greatest possible danger. If the omission to show the light in the one case must be taken to have led to the accident, how much more must the perilous position of the deceased in the other case.

I think the true rule in such case was laid down by the judge

1. In *Dowell v. General Steam Navigation Co.*, 5 El. & B. 195, it was held that a plaintiff cannot recover at law for mischief done to his ship by its being struck by defendant's ship, in consequence of the latter being improperly managed, if it appear that plaintiff's ship was improperly managed, and that such improper management di-

rectly contributed in any degree to the accident, however much the defendant may also be in fault; though if there be negligence on the part of the plaintiff only remotely connected with the accident, the question is, whether defendant, by ordinary care and skill, might have avoided the accident.

who tried the case last cited, in his instructions to the jury. He told them that "if there was negligence on the part of the plaintiff, as well as on the part of the defendant, which led to the collision, the plaintiff could not recover if the defendant could not have avoided the accident by reasonable care and skill; and that even supposing there had been negligence on the part of the plaintiff's vessel, still, if the steamer could, by ordinary care and skill, have avoided the collision, the defendant would have been answerable." The fact that a man was on the wrong side of the road does not necessarily constitute a defense in an action against another by whom he was run over; but if his being there was the immediate cause of the accident, it is a defense, even though the person by whom the injury was committed was himself at fault. One man cannot, by his own negligence, cast upon another the necessity of extraordinary care. Lord Campbell, in noticing the fact found by the jury, in *Dowell v. General Steam Navigation Co.*, *supra*, that "the preponderance of blame was with the steamer," said: "The jury think there was blame on both sides, by which the accident was occasioned, and this being so, it is immaterial, with regard to the verdict, whether the preponderance of blame was with the steamer or the other vessel."

The whole subject of mutual negligence is exceedingly well considered in *Trow v. Vermont Central R. R. Co.*, 23 Vt. 487. In that case the plaintiff had unlawfully turned his horse upon the highway. The defendants had unlawfully allowed their railroad track to remain unclosed. The horse, being upon the track of the defendants' road, was run over and killed by the defendants' engine. There was no evidence of any negligence in the manner of conducting the engine at the time of the accident. It was held to be a case of mutual negligence, and that no action would lie. In considering the question whether an action can be sustained, when the negligence of the plaintiff and the defendant has mutually co-operated in producing the injury, the following principles are stated. I think they are well established by authority:

1. When the negligence of each party is the *proximate* cause of the injury, no action can be sustained. The term "proximate cause" is used as distinguished from "remote." It refers to negligence occurring at the time of the injury. No matter on which side the preponderance of blame lies, if both are at fault at the time of the injury, neither can sustain an action. Hawkins

*v. Cooper*, 8 Carr. & P. 473, is an apt illustration of this rule (1). In that case the plaintiff had been run over in the street by the defendant's horse and cart, and injured. Upon the trial, Tindal, Ch. J., said to the jury: "You will determine for yourselves whether the injury was attributable to the negligence, carelessness and improper mode of driving of the defendant's servant. If you think it was attributable to that, *and to that alone*, you will find your verdict for the plaintiff. But if you think it was occasioned, *in any degree*, by the improper conduct of the plaintiff herself in crossing, in so incautious and improper a manner, in such case the defendant will be entitled to your verdict." A similar case was tried before Mr. Justice Coleridge about the same time. A female, just as she was stepping off the curbstone to cross a street, in the evening, was struck and knocked down by a cabriolet which was being driven, as the judge said, at a most improper pace for the time and place. The jury were told that if the plaintiff took proper and reasonable care, and it was on account of the extraordinary speed of the cabriolet that she could not save herself, and thus met with the accident, she was entitled to their verdict. But if she, by her own negligence and want of care, *contributed* to the accident, she could not recover, even though they should think the driver of the cabriolet was driving too fast, and was, therefore, guilty of negligence. *Woolf v. Beard*, 8 Carr. & P. 373; see also *Pluckwell v. Wilson*, 5 Carr. & P. 375 (2); *Williams v. Holland*, 6 Carr. & P. 23 (3); *Brand v.*

1. In *Hawkins v. Cooper*, 8 C. & P. 473, an action for an injury to a person crossing a public highway, by driving against him and knocking him down, it was held that the jury must be satisfied that the injury was attributable to the negligence of the driver, and to that alone, before they can find a verdict for the plaintiff; and if they think it was occasioned in any degree by the improper conduct of the plaintiff in crossing the road in an incautious and imprudent manner, they must find their verdict for the defendant.

2. In *Woolf v. Beard*, 8 Car. & P. 373, it was held, in an action for running against the plaintiff's carriage, that a plea that the damage was the

result of the negligence of both parties, is bad in substance as well as form, for it amounts to the general issue.

In *Pluckwell v. Wilson*, 5 C. & P. 375, it was held that although a person driving a carriage is not bound to keep on the regular side of the road, yet if he does not, he must use more care, and keep a better lookout to avoid collision, than would be necessary if he was on the proper side of the road.

3. In *Williams v. Holland*, 6 C. & P. 23, it was held that if an injury is occasioned partly by the negligence of the plaintiff and partly by that of the defendant, the plaintiff cannot maintain any action.

Troy & Schenectady R. R. Co., 8 Barb. 368, and cases there cited; *Sheffield v. Rochester & Syracuse R. R. Co.*, 21 Barb. 342.

2. Where the negligence of the plaintiff is proximate, and that of the defendant remote, no action can be sustained. In such a case the plaintiff himself is the immediate cause of the accident. This rule embraces all that class of cases where, at the time of the injury, the plaintiff was chargeable with a want of proper care. On the other hand, where the negligence of the defendant is proximate and that of the plaintiff remote, the action must be sustained. The question, then, is whether, it being conceded that the plaintiff was not without fault, the defendant might, by the exercise of reasonable care and prudence at the time of the injury, have avoided it. *Kerwhacker v. Cleveland, Columbus & Cincinnati R. R. Co.*, 3 Ohio St. 172, may be referred to in illustration of this rule. The plaintiff had carelessly let his hogs run at large in the vicinity of the defendants' uninclosed road. Being found upon the track, the hogs were run over and killed by the defendants' servants. It was held that, notwithstanding the carelessness of the plaintiff, the defendants were bound to use reasonable care in avoiding an injury. Being found guilty of gross negligence in the destruction of the hogs, the action was sustained. On the contrary, in *Trow v. Vermont Central R. R. Co.*, *supra*, the action was not sustained, because there was no want of care in avoiding the injury at the time it happened. See also the Donkey case (*Davies v. Mann*), 10 Mees. & W. 548 (1).

In the case now before us the jury, instead of being instructed, in substance, that the defendants were liable unless the "negligence of the deceased *directly* contributed to produce the catastrophe," should have been told that if the negligence of the deceased, at the time of the accident, in any way concurred to produce it, the plaintiff could not recover. The verdict of the jury shows that they must have been misled by the charge.

1. In *Davies v. Mann*, 10 M. & W. 546 (sometimes cited as the Donkey case), an action for killing an ass, which the declaration alleged to have been lawfully upon the highway when it met its death, it appeared that the animal, fettered by the forefeet, had been placed on the highway by the plaintiff, and was killed by being unable to get away from the defendant's wagon, which, without its driver, was coming at a smartish pace along the road. Held, that the jury was properly directed that, although it was an illegal act on the part of the plaintiff to put the animal on the highway, still, unless its being there was the immediate cause of the accident, the plaintiff was entitled to recover.

Upon the evidence before them they could not have said that the deceased was not chargeable with negligence, amounting to utter recklessness, in placing himself in the position in which he was first discovered. If in his senses, as he must be presumed to have been, he courted his own destruction. Under these circumstances he must be regarded as having co-operated with the defendants to produce his death. Unless the jury could be made to believe that, after the deceased was discovered, the defendants, by reasonable care, could have avoided the fatal result, they were not liable. That they could have done this has not been pretended. The testimony would scarcely warrant such a conclusion.

I am of opinion, therefore, that the judgment should be reversed and that a new trial should be awarded, with costs to abide the event.

All the judges concurred in the result of these opinions, and, for the most part, in the grounds stated in both of them. STRONG, J., after hearing the opinion of HARRIS, J., agreed that the word "*directly*" ought to have been withdrawn from the charge, though he doubted whether in this case it did any practical injury to the defendant; and in this JOHNSON, CH. J., and SELDEN, J., concurred. The latter objected to an implication which he conceived to lurk in the opinion of STRONG, J. (but which STRONG, J., disclaimed), that, in the absence of proof of any circumstances importing negligence on the part of the plaintiff, there might be a presumption thereof which he is required to repel; whereas, his negligence must be inferred from evidence, and is not to be presumed. For this reason he and ROOSEVELT, J., put their judgment mainly on the grounds stated by HARRIS, J. DENIO, J., was of opinion that the judge erred in refusing to charge as requested in respect to the negligence of the plaintiff in going upon the track while under the influence of intoxicating liquor. COMSTOCK, J., expressed no opinion.

Judgment reversed, and new trial ordered.

# YOUNG v. NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

*Court of Appeals, New York, December, 1887.*

[Reported in 107 N. Y. 500.]

PEDESTRIAN CROSSING TRACK STRUCK BY TRAIN — PASSING BETWEEN DIVIDED FREIGHT TRAIN AT CROSSING — FAILURE TO LOOK FOR TRAIN — CONTRIBUTORY NEGLIGENCE. — Plaintiff, who was familiar with the use and location of two of defendant's tracks, was walking along highway which intersected the tracks, and when he reached the crossing found a freight train on south track headed for the east; the train was divided and plaintiff passed through the opening between the cars, and as he stepped on north track was struck by an engine headed for the west; if he had looked east he could have seen an approaching train, but he looked west, and was struck by the engine coming from the east. *Held*, that plaintiff's negligence was such negligence as to bar recovery in action for damages. *Held*, also, that the mere fact that a person standing between the freight cars, whom plaintiff took to be a brakeman, failed to give warning of approaching train, did not excuse plaintiff from duty of looking (1).

DANFORTH, J., *dissented*.

APPEAL from judgment of the General Term of the Supreme Court in the Fourth Judicial Department, entered upon an order made January 19, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict. The facts appear in the opinion. *Judgment reversed*.

O. W. CHAPMAN, for appellant.

S. C. MILLARD, for respondent.

**Earl, J.** — This action was brought to recover damages for injuries received at a railroad crossing. The defendant's railroad passed east and west through the city of Binghamton, with two tracks, and Oak street passed north and south intersecting the railroad. The south track was used for eastward bound trains and the north for westward bound trains, and the space between the two tracks was about seven feet. The accident occurred about fifteen minutes after 6 o'clock P. M., on the 24th day of August, 1881, before sundown on a clear day. There was a freight train standing upon the south track headed east which

1. See notes of the New York cases *ings and on steam and street railroad relating to pedestrians injured at cross- tracks*, reported in this volume, *post*.

had been cut in two at Oak street, leaving a space of about twenty feet for the passage on the street of persons and teams. The plaintiff, going north in the centre of the street, passed through this space, and just as he stepped upon the north track was hit by an engine going west, and was badly injured.

There was conflict in the evidence as to the defendant's negligence, and since the verdict of the jury it must be assumed that that was sufficiently established. But there was no conflict in the evidence as to the material facts bearing upon the plaintiff's contributory negligence. He was in possession of all his faculties, on foot, entirely unincumbered, with nothing to attend to but his own safety. There is a great preponderance of evidence that he could have seen the train for at least one-third of a mile before it reached Oak street, while he was passing over a space of about sixty feet, until he came within about fifteen feet of the south track of the railroad. But the plaintiff testified that he looked while passing over that space, and did not and could not see the approaching train, and we must, therefore, take the fact to be that he could not have seen the train until he had passed over or nearly over the south track. The north track was straight for at least half a mile towards the east, and the moment the plaintiff got upon the middle of the space between the two tracks he could have seen a train approaching from the east for that distance. He was walking very rapidly, perfectly familiar with the location and the use which was ordinarily made of the two tracks, and as he crossed through the opening between the parts of the standing freight train, instead of looking east from which a train would ordinarily come on the north track, he looked to the west and heedlessly stepped immediately in front of the engine. As he passed over the north rail of the south track a single glance to the east would have disclosed to him the approaching train, and he would have escaped injury. He was in a place of some peril in crossing these tracks and should have taken some care to protect himself. He was in no danger from the train on the south track, as that was stationary. If that to some extent obstructed his view upon the north track, there was so much greater reason for him to take an observation the moment he had crossed the south track, so as to see whether he could cross the north track with safety, and for not doing so he is chargeable with contributory negligence, which bars his recovery. *Cordell v. N. Y. Central & Hudson River R. R. Co.*, 75

N. Y. 330 (1); *Woodard v. N. Y., Lake Erie & W. R. R. Co.*, 106 N. Y. 369 (2); *Davey v. London & S. W. R. R. Co.*, L. R., 11 Q. B. Div. 213, affirmed in Court of Appeals, 49 L. T. Rep (N. S.) 739 (3).

But there is a circumstance to which the trial judge attached some importance, but for which, as we must infer from the language of his charge, he would have nonsuited the plaintiff, to which we must now call attention. There was a brakeman upon the south track in or near the opening between the two parts of the standing freight train. The evidence on the part of the defendant is, that the brakeman warned the plaintiff and

1. See abstract of the *Cordell* case, 75 N. Y. 230, with its former decisions, in this volume of *AM. NEG. CAS.*, page 362, *ante*.

2. In *WOODARD v. N. Y., LAKE ERIE & WESTERN R. R. CO.*, 106 N. Y. 369, where a person was killed at street crossing by a coal car kicked from a train, which he might have seen had he looked in its direction, but instead looked at a train passing on another track, judgment for plaintiff was reversed.

3. The facts in *Davey v. London & Southwestern R'y*, 12 Q. B. D. 70, 49 L. T. 739, affirming 11 Q. B. D. 213, were as follows: The defendant's railway crossed a public footway on the level. About half-past four o'clock in the afternoon of March 29, 1882, the plaintiff, a foot passenger, while crossing from the down side to the up side of the railway was knocked down and injured at the crossing by a train of the defendants on the up line. Owing to the position of certain buildings which stood by the line, it was impossible for any one crossing from the down side to see a train coming until he got within a step or two from the down line, but a person standing on the down line or the six-foot had a clear and uninterrupted view up and down the line for several hundred yards. The plaintiff, who lived near

and was well acquainted with the crossing, stated that before crossing he looked to the right along the down line, but he admitted that he did not look to the left along the up line and that if he had looked he must have seen the train coming. The engine driver did not whistle. There was a servant of the defendants employed as a gatekeeper at the crossing whose duty it was to open the gates there when carriages could be safely admitted, and to close them at other times. He was standing at the time on the opposite side of the crossing talking to two boys, with a furled flag in his hand, but he gave no warning to the plaintiff that a train was coming. The plaintiff, having brought an action against the defendants to recover compensation for his injuries, was nonsuited on the above facts being proved at the trial. On appeal (11 Q. B. D. 213), nonsuit was affirmed, and on further appeal to the Court of Appeals (November, 1883), it was held by *BRETT, M. R.*, and *BOWEN, L. J.* (*BAGGALLAY, L. J.*, dissenting), that the nonsuit was right as, although there was evidence of negligence on the part of the defendants, yet, according to the undisputed facts of the case, the plaintiff had shown that the accident was solely caused by his omission to use the care which any reasonable man would have used.



attempted to arrest his progress. The evidence on the part of the plaintiff tends to show that the brakeman said nothing and made no sign to the plaintiff, and we must assume his evidence to be true. But it does not appear that the brakeman was stationed there for the purpose of warning travelers upon the street of the approach of trains upon the north track, or in any way for the protection of travelers. He was there simply for the purpose of connecting the two parts of the train when he should be signalled to do that, and hence he omitted no duty resting upon him in not warning the plaintiff. It does not appear that the plaintiff knew he was a brakeman, or that he understood that he was standing there to warn travelers upon the street, or that he supposed that he owed him any duty whatever. And it does not appear that the plaintiff relied upon him for protection, that he was lulled into a sense of security by the absence of any warning, or that his conduct was in any way influenced by his presence there. The plaintiff passed on through the opening apparently giving heed to nothing, at a rate of speed characterized by the trial judge as "almost approaching a run." It is, therefore, impossible to perceive how the presence there of the brakeman relieved the plaintiff from the duty of the vigilant use of his senses to secure his own safety. If the brakeman had in any way invited the plaintiff to cross or had given him any assurance that it was safe to cross, the case would be different. The case would also be different if the plaintiff had known that the brakeman was placed there to warn travelers of the approach of trains, and if, as he approached, the brakeman seeing him had given him no warning. It may be that in such a case it would have been a question of fact for the jury to determine whether or not the plaintiff was guilty of negligence in crossing without looking for himself to see whether a train was approaching. It was, however, after great consideration, held otherwise in the case of *Davey v. London & Southwestern R'y Co.*, *supra*, which is singularly like this. There the defendant's railway crossed a public footway on the level. The plaintiff, a foot passenger, while in the daytime crossing from the down side to the up side of the railway was knocked down and injured at the crossing by a train of the defendant on the up line. Owing to the position of certain buildings which stood by the line, it was impossible for any one crossing from the down line to see a train coming until he got within a step or two from the down line, but a

person standing on the down line or the six-foot, had a clear and uninterrupted view up and down the line several hundred yards. The plaintiff stated that before crossing he looked to the right along the down line, but he admitted that he did not look to the left along the up line, and that if he had looked he must have seen the train coming. The engine driver did not whistle. There was a servant of the company employed as a gatekeeper at the crossing, standing near the crossing, but he gave no warning to the plaintiff that a train was coming. The plaintiff was nonsuited, and the court held, among other things, that the presence of the gatekeeper, who gave no warning, did not excuse the plaintiff from looking out for his own safety.

We are, therefore, of opinion that the plaintiff should have been nonsuited, and hence the judgment should be reversed, and a new trial granted, costs to abide event.

All concur, except DANFORTH, J., dissenting.

Judgment reversed.

## MATZE v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

*Supreme Court, New York, Third Department, May Term, 1874.*

[Reported in 1 Hun, 417.]

CROSSING ON RAILROAD RIGHT OF WAY — TRESPASSER — CONTRIBUTORY NEGLIGENCE. — Where plaintiff crossed defendant's track at a point where people were in the habit of crossing, but which place, while intended for a street, had not been opened or graded by the city, and while so crossing was struck by an engine, it was *held* that plaintiff was a trespasser and was guilty of negligence in being on the track, and nonsuit should have been granted.

MOTION for a new trial on exceptions, ordered to be heard at the General Term in the first instance.

"The action was brought to recover damages for personal injuries sustained by the plaintiff, by reason of the negligence of the defendant. It was tried before one of the justices of this court and a jury, at the Albany Circuit, in June, 1873.

"At the close of the plaintiff's testimony the defendant's counsel moved for a nonsuit on the following grounds:

"First. No negligence has been shown on part of defendant.

"Second. The evidence shows that the plaintiff's injury was caused or contributed to by his own negligence.

"Third. That the plaintiff was improperly on the track of the defendant; that he was not using it for the purpose of a crossing, but was using it for his own convenience, and without the consent or permission of defendant, and cannot, therefore, maintain this action.

"At the close of the whole case the motion for nonsuit was renewed upon the grounds stated before, and upon the further ground that it appeared affirmatively that, at the time of this accident, the city had done nothing to throw the street open to the public, and had not graded it, and it was not in a condition to be used as a street, and that the city had not at that time become entitled to cross the lands of the defendant. The judge denied the motion, and the defendant's counsel duly excepted."

The court, among other things, charged that "if persons were passing and repassing there, going to Dedrick's and to the Observatory, and to the Tivoli Hollow, then it is undoubtedly true that the defendant should exercise care, as plaintiff claims;" to which the defendant excepted.

"The defendant's counsel asked the court to charge that the place where plaintiff was injured was not a highway, and the court so charged.

"Defendant's counsel asked the court to charge that the public had no right to use the land of the defendant, at the place where plaintiff was injured. The court said: 'As an abstract proposition, you are right; but if they were in the habit of crossing and recrossing upon that track, they were bound to use care and caution in running at that point.'

"Defendant's counsel excepted to the qualification.

"Defendant's counsel asked the court to charge that the plaintiff had no right to be upon defendant's track at the place where he was injured. The court said: 'That is true, with the qualification I have already stated.' Defendant's counsel excepted to the refusal and qualification.

"Defendant's counsel requested the court to charge that the defendant owed no duty to plaintiff, except to do him no intentional wrong or injury, under the evidence, and the court so charged.

"The jury found a verdict in favor of the plaintiff for \$1,000, and the court ordered that the bill of exceptions to be made be first heard at General Term." *Judgment reversed.*

MATTHEW HALE, for defendant.

HENRY SMITH, for plaintiff.

**Miller, P. J.** — The plaintiff was injured while crossing the track of the defendant's railroad, within the corporate limits of the city of Albany. The plaintiff was a mechanic, and upon returning home from his work, on the evening of the day upon which the accident occurred proceeded down some steps to the railroad track of defendant, walked along on the east side of the track upon a sidewalk, and then, because it was bad, took the middle of the east track, some fifty or sixty feet towards Albany, until he came to a malthouse; then crossed over to the west track, where two tracks came near together, and to about the middle of what was claimed to be a street, where, after looking to see if trains were approaching, he turned to look towards Schenectady, when an engine came along, caught him on the left arm, by the part of the machine at the side, knocked him down across the track, when the wheel ran over his left leg and cut it off. At the place where the plaintiff was injured proceedings had been taken to lay out a street; awards had been made to the owners of the land, and all but the defendant had paid. There was proof to show that the alleged street was being graded, and that the teams working on it passed through. It appeared, however, that the city had not done any work in opening or grading the street, or in taking possession of the railroad over which it was located, but there was evidence that people had been in the habit of passing and repassing on foot, to and from the Observatory and to Tivoli Hollow and Dedrick's by a footpath. I think the court erred in refusing the motion for a nonsuit. It is apparent that there was no highway or street laid out where the accident occurred. This was very properly, I think, assumed by the judge in his charge, as the case is entirely destitute of any evidence showing that such was the fact.

The question then arises, whether the use of the defendant's land for passing and repassing in the manner stated was of such a character as to give the plaintiff and other parties a right which imposed upon the defendant the duty of exercising care and caution towards strangers who choose to trespass upon defendant's land. I am not aware of any legal principle upon which any such right can be upheld. The defendant had an exclusive right to the use of its track at the place where the plaintiff was injured. The plaintiff was there without any authority whatever, and was, therefore, guilty of negligence in being on the

track at the time, which negligence contributed to the injury, and should have been a ground for nonsuit.

The fact that other persons were in the practice of passing at the place named did not of itself confer any right upon the plaintiff or impose any additional duty upon the defendant, and the court was clearly wrong in charging to the contrary in effect. No right of the public can be acquired in such a manner; at least, without evidence of notice, and acquiescence afterward. If such a theory could be permitted to prevail, railroad corporations might be subjected to serious liabilities, without their knowledge or consent, by the action of individuals, assuming to establish rights which are entirely unauthorized. I do not understand that they owe any duty, even to the owner of a private right of way, through which they pass, which calls upon them to exercise care in the running of their trains, much less should it be imposed near a populous city where trespassers expose themselves to injury without license. They are not bound to look out for those who, without a particle of right, intrude upon their tracks. Such an act is unlawful and not to be expected, and it matters not whether the population be large or small, the rule of law is unswerving and cannot be changed to meet the exigencies of varying circumstances, which may attend unlawful trespassers upon their property. It is enough, in this case, to defeat plaintiff's action that the plaintiff was on defendant's track without license or permission, and with no proof to show that he was invited, or that any of the defendant's officers or employees had knowledge that it was appropriated to any such use. The principle stated is fully upheld in *Phila. & Reading R. R. Co. v. Hummell*, 44 Pa. St. 375-379, 380. See also *Bush v. Brainard*, 1 Cow. 78.

Even if there was any evidence from which a license might be inferred, and the plaintiff was not a trespasser, such license created no legal right and imposed no duty upon the defendant, except the general duty which every man owes to others, to do them no intentional wrong or injury. (*Nicholson v. Erie R. R. Co.*, 41 N. Y. 530.) The court charged in accordance with this proposition, which of itself, I think, authorized a nonsuit (1).

1. See *NICHOLSON v. ERIE R'y Co.*, 41 N. Y. 525, where plaintiff's intestate, by train; *held*, railroad not bound to on stormy night, while crossing branch track on premises of another corporation; judgment for plaintiff for \$1,800 reversed.

The court was in error in the refusal to charge the various requests made by the defendant's counsel, which it did not charge, and for these errors, as well as the refusal to nonsuit, a new trial must be granted, with costs to abide the event.

New trial granted, with costs to abide the event.

## MALLOY v. STATEN ISLAND RAPID TRANSIT RAILROAD COMPANY.

*Supreme Court, New York, Second Department, May Term, 1894.*

[Reported in 78 Hun, 166.]

**WHEN PERSON ON WHARF IS A TRESPASSER.** — A wharf inclosed from the street and alleged in the complaint to be occupied by the defendant, in the absence of any evidence as to the source of the defendant's title will be assumed to be private property, and one who gains access thereto without authority must be treated as a trespasser (1).

**PERSON ON WHARF INJURED BY FERRY BOAT ENTERING ADJOINING SLIP.** — Where the plaintiff gained access to the wharf from adjoining property and while seated on the edge next a ferry slip belonging to the defendant was crushed by the side of the slip being forced against his legs by the defendant's ferry boat entering the slip, the company not having any notice that he was there, was not liable for the injuries.

**APPEAL** by the plaintiff, James Malloy, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the County of Kings on the 15th day of November, 1893, upon a dismissal of the complaint directed by the court after a trial at the Kings County Circuit. The facts appear in the opinion. *Judgment affirmed.*

BENEDICT & BENEDICT, for appellant.

TRACY, BOARDMAN & PLATT, for respondent.

**Brown, P. J.** — The plaintiff in this action received injuries under peculiar circumstances.

On the 19th day of August, 1891, he went upon a wharf occupied by the defendant in the city of New York to fish. East of the wharf was a ferry slip also occupied by the defendant. The slip was constructed of piles driven into the bottom of the river and planked on the inside.

1. As to trespasser on railroad right of way, see *Matze v. N. Y. Central R. R. Co.*, 1 Hun, 417, preceding case reported.

The west side of the track was about five feet from these at side of the wharf, and, into that place plaintiff dropped his fish line and sat down on the edge of the wharf with his legs over the side.

A ferryboat entering the slip struck against the rack, forcing it over towards the dock, and plaintiff's legs were caught and crushed between the rack and dock.

The foundation of the appellant's argument for a reversal of this judgment is that the wharf where the accident occurred is a public street. I am unable to find in the case any foundation for this claim.

The complaint alleges, and the answer admits, that the defendant "is the owner of a franchise under which it operates a ferry between Staten Island and New York \* \* \* and \* \* \* the lessee and occupant of a wharf and ferry slip in the East river," etc.

The source of defendant's title is not shown, nor does it appear that the wharf is at the river end of any street of the city. On the contrary, it does appear that it was shut off from the street in front of it by a solid building, and access was had to it through gates controlled by the defendant. The only access to it was through this gate or over property of other persons.

A public street leased to and occupied by a private individual, and from which the public was excluded, as they appear to have been from this, would be an anomaly. Omitting any reference to the legislation with reference to the water front of the city of New York along the shores of the Hudson and East rivers, it is sufficient to say that numerous piers about the city are now made the subject of private ownership and control. The general course of legislation upon this subject is set forth quite fully in recent cases in the Court of Appeals. *Langdon v. The Mayor*, 93 N. Y. 129; *Williams v. The Mayor*, 105 Id. 419; *Kingsland v. The Mayor*, 110 Id. 569.

While originally the wharves and exterior streets which were constructed at the expense of or by riparian owners were made public and open to the commerce of the port and the free access of the people, later legislation has modified the prohibitions and restraints of the earlier law. And now many of the piers and wharves on the river front are occupied by steamship and railroad companies and by private individuals by titles which are for the time being practically that of private ownership.

Under the allegations and admissions of the pleadings, and in the absence of any evidence as to the source or character of the defendant's title, we must assume that the wharf in question was a private pier. It was inclosed from the street, and the plaintiff had no right there. The defendant had no notice that he was there and was under no duty or obligation to him in reference to the management of its boat. He went upon the wharf in a roundabout way, getting access from adjoining property, and must be treated as a trespasser.

Under such circumstances there was no negligence upon the part of the defendant, and the complaint was properly dismissed. *Victory v. Baker*, 67 N. Y. 366; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391.

The judgment should be affirmed, with costs. PRATT and DYKMAN, JJ., concurred.

## LYONS, ADM'R, v. SECOND AVENUE RAILROAD COMPANY.

*Supreme Court, New York, First Department, October Term, 1895.*

[Reported in 89 Hun, 374.]

**WOMAN RUN OVER — INJURIES RESULTING IN DEATH — QUESTION FOR JURY.** — In an action to recover damages for the death of plaintiff's intestate who, while walking on the sidewalk, was knocked down and injured by a team which escaped defendant's driver, the injuries sustained resulting in death induced, as alleged, by the shock from the accident, the immediate cause of death being Bright's disease, the question at issue being whether the accident was the cause of death of plaintiff's intestate, and a number of medical witnesses having been called on both sides, it was held, that the question whether the injury was the cause of death was a fair question for the jury, and verdict for plaintiff would not be disturbed (1). **DAMAGES.** — Where deceased, a woman sixty-seven years old, was at the time of accident in good health and performed all labors in plaintiff's household, a verdict for \$5,000 damages was not excessive.

**APPEAL** by the defendant, the Second Avenue Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the County of New York on the 30th day of January, 1895, upon the verdict of a jury rendered after a trial at the New York Circuit, and also

1. The Lyons case (the case at bar), was affirmed, without opinion, in 152 N. Y. 654.



from an order entered in said clerk's office on the 7th day of February, 1895, denying the defendant's motion for a new trial made upon the minutes. The facts sufficiently appear in the opinion. *Judgment for \$5,000 affirmed.*

PAYSON MERRILL and GEORGE C. HOLT, for the appellant.

SUMNER B. STILES and FRANCIS L. WELLMAN, for the respondent.

**Follett, J.** — This action was begun July 28, 1894, to recover damages resulting from the decedent's death, caused, it is alleged, by the negligence of the defendant and of its employee.

The defendant on this appeal does not challenge the finding of the jury that the decedent was injured September 8, 1892, by the negligence of the defendant and of its servant, and that she did not by any act or omission contribute to the accident. There was no conflict in the evidence in respect to the accident, its cause or the decedent's conduct, on the occasion. None of the exceptions taken to the charge or to the rulings upon the admission or exclusion of evidence are questioned, and we are asked to reverse the judgment solely on the grounds: 1. That the accident was not the cause of death; 2, that the damages awarded, \$5,000, were excessive.

September 8, 1892, the decedent, while walking on the sidewalk of East Twenty-eighth street, was knocked down and injured by a team which escaped from the defendant's driver (1). Her right leg was considerably injured — to such an extent that she never fully recovered from its effects — and she sustained so severe a shock that she remained in a semi-unconscious condition for two or three days. At this time the decedent was sixty-three years of age, and had, before the accident, been possessed of good health, but from the time of the accident to May 2, 1893, when she died, she was in feeble health. The immediate cause of her death was Bright's disease, induced, it is asserted, by the shock. The physician who attended the decedent during her last illness, and had been the family physician for a year or more preceding the accident, testified that the disease of which she died was traceable to and caused by the injury. Another physician, an instructor for seven years at the College of Physicians and Surgeons at Columbia College, testified that in his opinion the accident caused the disease of which she died. A physician,

1. See notes of New York cases, following the case at bar, relating to pedestrians crossing steam and street railroad tracks, run-over cases, etc.

who had been employed by the defendant in its accident cases for two years, testified that he saw the decedent four days after her injury; that he found three contused and lacerated wounds on her right leg below the knee. He testified that he saw no evidence that the patient was suffering from shock, but noticed that her legs were swollen, but that the swelling could not, in his opinion, have been produced by the injury. He said that, in his opinion, the decedent then had chronic Bright's disease and died from its effects, and that the disease was not caused by the injury. A physician who has been a professor of clinical medicine and therapeutics for several years was called by the defendant and testified as an expert that, in his opinion, founded upon the evidence, the injury was not the cause of the disease of which the woman died. This witness had never seen the patient. Each side swore the same number of medical witnesses, but those sworn in behalf of the plaintiff had the best means of knowing the facts and forming an opinion, and their opinions were supported by the evidence of the plaintiff in respect to the previous good health of his wife. We think, under the evidence, that the question whether the injury was the cause of death was a fair question for the jury, and that its verdict cannot be disturbed. Nor do we think the verdict should be set aside because the damages were excessive. The decedent was sixty-three years of age, in good health, and performed all of the labors in plaintiff's household. She left her husband and one unmarried daughter, of full age, her only next of kin, the three before her death living together as one family. The daughter, before her mother's illness, had employment elsewhere. The estimate of the damages sustained in such cases is necessarily based upon probabilities, and can never be ascertained with accuracy or to the satisfaction of both parties. Under the decisions of this court, we cannot reverse the judgment and set aside the verdict upon the ground that the damages awarded were excessive.

The judgment and order should be affirmed, with costs.

#### NOTES OF NEW YORK CASES RELATING TO ACCIDENTS AT CROSSINGS, COLLISIONS, AND RUN-OVERS.

Among the numerous decisions in New York relating to ACCIDENTS TO PEDESTRIANS AT CROSSINGS, COLLISIONS WITH STREET CARS AND VEHICLES, RUN-OVER ACCIDENTS (other than the cases reported in this volume of AM. NEG. CAS.) are the following:

**Pedestrians injured on steam railroad tracks.***Injured or killed by train at street crossing.*

**WILDS v. HUDSON RIVER R. R. Co.**, 24 N. Y. 430, plaintiff's intestate run over by train at street crossing while crossing track; failure to look for approaching train; judgment for plaintiff for \$4,000 reversed; contributory negligence.

See also subsequent appeal in the WILDS case, 29 N. Y. 315, where judgment of nonsuit was affirmed.

**BERNHARD v. RENSSELAER & SARATOGA R. R. Co.**, 1 Abb. Ct. App. Dec. 131, plaintiff's intestate run over by engine passing station platform at street crossing; judgment for plaintiff for \$4,000 affirmed.

**MAGINNIS v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.**, 52 N. Y. 215, woman struck and killed at street crossing by slowly backing train moving along street without light; judgment for \$3,500 affirmed.

**HEANEY v. LONG ISLAND R. R. Co.**, 112 N. Y. 122, struck and killed by train at street crossing; judgment for plaintiff reversed, it being held negligent to cross track in cloud of smoke.

See also **McNAMARA v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.**, 136 N. Y. 650, where woman was killed at crossing by backing engine, smoke preventing clear view of track; judgment on verdict for plaintiff for \$5,000 affirmed.

**FEENEY v. LONG ISLAND R. R. Co.**, 116 N. Y. 375, person with umbrella up, crossing track at street crossing, struck by descending gate; judgment for plaintiff for \$700 affirmed.

**OLDENBURG v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.**, 124 N. Y. 414, person killed by locomotive at street crossing; contributory negligence for jury; judgment for plaintiff for \$2,500 affirmed.

**WIWIROWSKI v. LAKE SHORE & MICHIGAN SOUTHERN R. R. Co.**, 124 N. Y. 420, person walking with his wife, across track at night, run over and killed at street crossing by backing train; no evidence that deceased looked for trains; contributory negligence; judgment for plaintiff for \$2,500 reversed (58 Hun, 40, reversed), the court holding that nonsuit should have been granted.

The Supreme Court in the WIWIROWSKI case, 58 Hun, 40, on appeal from trial court, said (in affirming the judgment) that: "The only substantial controversy on this appeal is whether the deceased was guilty of contributory negligence, and whether the cause was so barren of proof upon that question as to require that the plaintiff should have been nonsuited or that a verdict should have been directed in favor of the defendant. In **Parsons v. N. Y. Central & H. R. R. Co.**, 113 N. Y. 355, 364, the rule is thus stated by the

judge delivering the opinion, 'The question is whether the injured party, under all the circumstances of the case, exercised that degree of care and caution which prudent persons of ordinary intelligence usually exercise under like circumstances. This rule must in all cases, except those marked by *gross and inexcusable negligence*, render the question involved one of fact for the jury.' " All the more recent cases are to the same effect. *Galvin v. Mayor of New York*, 112 N. Y. 223; *Palmer v. Dearing*, 93 N. Y. 7; *Hourney v. Brooklyn City R. R. Co.*, 27 N. Y. St. Rep. 49; *Beckwith v. N. Y. C. & H. R. R. Co.*, 28 N. Y. St. Rep. 130; *Tolman v. Syracuse, Bing. & N. Y. R. Co.*, 98 N. Y. 203; *Cowan v. Third Ave. R. R. Co.*, 31 N. Y. St. Rep. 145. The evidence in this case required a submission of this question to the jury." \* \* \*

*MEHEGAN v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 125 N. Y. 768, train in plain sight, but person not looking for same struck and killed by it at street crossing; judgment for plaintiff reversed.

*Injured or killed at country crossing.*

*SCAGGS v. DEL. & HUDSON CANAL Co.*, 145 N. Y. 201, action for damages for death of plaintiff's intestate who, while waiting at village crossing for train to pass, the gates being down, was struck by a horse attached to a wagon which was also waiting to cross the track, the horse becoming frightened at the noise of steam from locomotive; deceased was warned by driver of danger but paid no attention; judgment of nonsuit affirmed (reversing 74 Hun, 198, granting new trial).

See also *BORST v. LAKE SHORE & MICHIGAN SO. R'y Co.*, 4 Hun, 346, affirmed in 66 N. Y. 639, a case somewhat similar to the *SCAGGS* case, *supra*, where judgment for plaintiff for \$500 was affirmed.

*WARNER v. N. Y. CENTRAL R. R. Co.*, 44 N. Y. 465, person injured at country crossing; judgment for plaintiff for \$5,000 reversed for erroneous instructions as to duty of railroad company at crossings, it being held that a railroad company has the right of way at crossings, and that no duty is required to run its trains slowly at country crossings.

*Injured or killed at railroad crossings.*

*ERNST v. HUDSON RIVER R. R. Co.*, 35 N. Y. 9, plaintiff's intestate crossing track killed by locomotive; questions of negligence of parties for jury; judgment of nonsuit reversed.

See former appeal in the *ERNST* case, 24 How. Pr. 97. See also third appeal in the *ERNST* case, 39 N. Y. 61, where judgment for plaintiff for \$5,000 was affirmed.

COOK *v.* N. Y. CENTRAL R. R. Co., 1 Abb. Ct. App. Dec. 432, plaintiff's intestate killed at crossing by backing train; conflicting evidence as to signals, etc.; error to nonsuit.

HAVENS *v.* ERIE R'Y Co., 41 N. Y. 296, plaintiff's intestate killed at crossing; signals not given; judgment for plaintiff for \$1,300 reversed, traveler not being excused from duty of looking and listening for trains before crossing track because of failure of railroad company to give statutory signals.

See also BAXTER *v.* TROY & BOSTON R. R. Co., 41 N. Y. 502, where judgment for plaintiff for \$600 was reversed, omission of railroad company to give statutory signals not excusing traveler from looking and listening for train at crossing.

GORTON *v.* ERIE R'Y Co., 45 N. Y. 660, person crossing track without looking for train struck by train at crossing; judgment for plaintiff for \$1,000 reversed.

See also LEVY *v.* GREAT WESTERN R. R. Co., 48 N. Y. 675, where judgment for plaintiff for \$3,500 was reversed on grounds stated in the Gorton case, *supra*.

KELLY *v.* LONG ISLAND R. R. Co., 47 N. Y. 657, injured at crossing; judgment for plaintiff for \$5,000 affirmed.

MADDEN *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 47 N. Y. 665, woman killed by train at crossing; negligence to cross when approaching train is seen; judgment for plaintiff for \$2,000 reversed.

WELCH *v.* N. Y. CENTRAL R. R. Co., 53 N. Y. 610, person killed at crossing; judgment for plaintiff for \$3,500 affirmed.

HACKFORD *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 53 N. Y. 654, person killed by train at crossing; judgment for plaintiff for \$2,500 affirmed.

ROACH *v.* FLUSHING & N. S. R. R. Co., 58 N. Y. 626, person struck by train at crossing; failure to signal; judgment for plaintiff for \$500 affirmed.

MCGRATH *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 59 N. Y. 468, person struck by train at crossing; judgment for plaintiff reversed; erroneous admission of evidence as to absence of flagman at crossing, as absence did not excuse plaintiff's duty of looking for train.

See also 63 N. Y. 522, where judgment for defendant in the McGrath case was reversed.

MITCHELL *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 64 N. Y. 655, woman killed at crossing; contributory negligence; nonsuit affirmed.

PAKALINSKY *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 82 N.

Y. 424, struck by engine at crossing; foot caught between rail and planking; person saw approaching train, but took risk of crossing; judgment for plaintiff reversed.

*Injured or killed on railroad track.*

NEWSON *v.* N. Y. CENTRAL R. R. Co., 29 N. Y. 383, team frightened by noise of train backing down on side track, and plaintiff's intestate, who was unloading gravel from defendant's car on another track, in attempting to control horses, received fatal injuries; judgment for plaintiff for \$2,000 affirmed.

STINSON *v.* N. Y. CENTRAL R. R. Co., 32 N. Y. 333, person loading car killed by train suddenly backing against car; judgment for plaintiff for \$2,500 affirmed.

WILCOX *v.* ROME, WATERTOWN & OGDENSBURG R. R. Co., 39 N. Y. 358, plaintiff's intestate walking alongside track at city crossing struck by train; failure to give statutory signals does not give traveler right to assume that train is not coming; judgment for plaintiff for \$1,500 reversed.

HARTY *v.* CENTRAL R. R. CO. OF NEW JERSEY, 42 N. Y. 468, plaintiff's intestate walking along track struck and killed by train; negligence to go on railroad track without looking for trains; statutory duty of railroad company to give signals at crossings applies to travelers on highways, not to persons walking on track; judgment for plaintiff for \$2,750 reversed and judgment absolute for defendant.

IN ECKERT *v.* LONG ISLAND R. R. Co., 43 N. Y. 502, where plaintiff's intestate, in attempting to save life of a child who was on railroad track while train was approaching at a rapid rate of speed, was killed by the train, not being able to get clear of track in time to save himself, although child was saved, it was held that it is not negligence to put self in danger in attempt to save life, and judgment for plaintiff for \$3,500 was affirmed.

VAN SCHAICK *v.* HUDSON RIVER R. R. Co., 43 N. Y. 527, plaintiff's intestate, after getting off defendant's train, walking on main track and getting behind cars on side track, and while standing there struck by backing cars; railroad not liable; judgment for plaintiff for \$5,000 reversed.

DORMAN *v.* BROADWAY R. R. Co., 117 N. Y. 655, person accidentally falling on track run over and killed by train; judgment for plaintiff reversed.

HAINES *v.* NEW YORK CENTRAL & HUDSON RIVER R. R. Co., 145 N. Y. 235, person walking alongside of railroad track at crossing struck by train and fatally injured; judgment for plaintiff affirmed.

**Run over by street cars.***Injured on street car-tracks.*

WHITAKER *v.* EIGHTH AVE. R. R. Co., 51 N. Y. 295, person run over by defendant's street car; judgment for plaintiff for \$2,500 reversed.

See also UNGER *v.* FORTY-SECOND & GRAND STREET FERRY R'y Co., 51 N. Y. 497, person run over by street car; judgment for defendant, reversing verdict for plaintiff for \$5,000.

LUBY *v.* HUDSON RIVER R. R. Co., 17 N. Y. 131, run over by defendant's car in street; judgment for plaintiff for \$2,000 reversed, it being held that the driver's statement given not at time of, but after the accident, was not admissible against defendant.

HAGGERTY *v.* BROOKLYN CITY & NEWTOWN R. R. Co., 61 N. Y. 624, run over by street car; judgment for plaintiff for \$3,000 affirmed.

MCCLAINE *v.* BROOKLYN CITY R. R. Co., 116 N. Y. 459, person crossing street, having looked to see if safe to cross, struck by street car; judgment for plaintiff for \$6,000 affirmed.

SILBERSTEIN *v.* HOUSTON, WEST STREET & PAVONIA FERRY R. R. Co., 117 N. Y. 293, person crossing street slipping on ice and run over by horse car; erroneous admission of evidence as to failure to remove ice; judgment for plaintiff for \$15,000 reversed.

*Pedestrians injured at crossings or on tracks (steam and street railroads).*

In addition to the cases already reported or noted in this volume of AM. NEG. CAS., see the following:

Calligan *v.* N. Y. Central & H. R. R. Co., 59 N. Y. 651 (killed at street crossing); Cordell *v.* N. Y. Central & H. R. R. Co., 64 N. Y. 535, 70 N. Y. 119, 75 N. Y. 330, 79 N. Y. 636 (killed at farm crossing); Haycroft *v.* Lake Shore & M. S. R'y Co., 64 N. Y. 636 (injured at street crossing); Gray *v.* Second Avenue R. R. Co., 65 N. Y. 561 (runaway; horse frightened by snowplough on track); Sutton *v.* N. Y. Central R. R. Co., 66 N. Y. 243 (killed crossing track at place not public crossing); Ditchett *v.* Spuyten Duyvil, etc., R. R. Co., 67 N. Y. 425 (killed by falling into railway cut); Day *v.* Flushing, N. S. & C. R. R. Co., 75 N. Y. 610 (killed at crossing); Lowery *v.* Brooklyn City & N. R. R. Co., 76 N. Y. 28 (defective crossing); Casey *v.* N. Y. Central & H. R. R. Co., 78 N. Y. 51 (killed at street crossing); Stackus *v.* N. Y. Central & H. R. R. Co., 79 N. Y. 464 (injured at crossing); Smedis *v.* Brooklyn & Rockaway Beach R. R. Co., 88 N. Y. 13 (killed at crossing); McKeever *v.* N. Y. Central & H. R. R. Co., 88 N. Y. 667 (killed at

crossing); *Crocker v. Knickerbocker Ice Co.*, 92 N. Y. 652 (run over by ice wagon); *Byrne v. N. Y. Central & H. R. R. Co.*, 94 N. Y. 12 (injured at place not public crossing); *Waldele v. N. Y. Central & Hudson River R. R. Co.*, 95 N. Y. 274 (killed crossing track); *Cranston v. N. Y. Central & H. R. R. Co.*, 103 N. Y. 614 (killed at crossing); *Gardinier v. N. Y. Central & H. R. R. Co.*, 103 N. Y. 674 (body found on track); *Sherry v. N. Y. Central & H. R. R. Co.*, 104 N. Y. 652 (killed at village crossing); *Tozer v. N. Y. Central & H. R. R. Co.*, 105 N. Y. 617 (injured at crossing); *Woodard v. N. Y., Lake Erie & Western R. R. Co.*, 106 N. Y. 369 (killed at street crossing); *Young v. N. Y., Lake Erie & Western R. R. Co.*, 107 N. Y. 500 (injured at crossing); *Palmer v. N. Y. Central & Hudson River R. R. Co.*, 112 N. Y. 234 (run over at crossing); *Lewis v. N. Y., Lake Erie & W. R. R. Co.*, 123 N. Y. 496 (injured at crossing); *Daniels v. Staten Island Rapid Transit R. R. Co.*, 125 N. Y. 407 (deaf person crossing track killed by train); *Rodrian v. N. Y., New Haven & H. R. R. Co.*, 125 N. Y. 526 (woman killed at street crossing); *Scott v. Penn. R. R. Co.*, 130 N. Y. 669 (struck by train on track); *Schild v. Central Park, N. & E. R. R. Co.*, 133 N. Y. 446 (defective street-car track); *Doyle v. Penn. & N. Y. Canal, etc., R. R. Co.*, 139 N. Y. 637 (woman killed crossing track at night; numerous tracks); *Vandewater v. N. Y. & New England R. R. Co.*, 135 N. Y. 583 (farm-crossing accident); *Bates v. N. Y. Central & H. R. R. Co.*, 84 Hun, 287; *Krauss v. Wallkill Valley R. R. Co.*, 69 Hun, 482; *Zwack v. N. Y., Lake Erie & W. R. R. Co.*, 8 App. Div. 483; *Donovan v. Long Island R. R. Co.*, 67 Hun, 73; *Martin v. N. Y. Central & H. R. R. Co.*, 27 Hun, 532; *Northrup v. N. Y., Ontario & W. R. R. Co.*, 37 Hun, 295; *McPeak v. N. Y. Central & H. R. R. Co.*, 85 Hun, 107; *Collins v. N. Y., Chicago & St. L. R. R. Co.*, 92 Hun, 563; *Rainey v. N. Y. Central & H. R. R. Co.*, 68 Hun, 495; *Mitchell v. Broadway & S. A. R. R. Co.*, 70 Hun, 387; *Murray v. Forty-second Street R. R. Co.*, 9 App. Div. 610; *Whalen v. N. Y. Central & H. R. R. Co.*, 15 N. Y. Supp. 941, see also 58 Hun, 431 (struck by train at grade crossing); *Fowler v. N. Y. Central & H. R. R. Co.*, 74 Hun, 141, affirmed in 147 N. Y. 717 (street crossing); *Phillips v. N. Y. & New England R. R. Co.*, 80 Hun, 404 (climbing between cars at crossing); *O'Toole v. Central Park, N. & E. R. R. Co.*, 12 N. Y. Supp. 347, affirmed in 128 N. Y. 597 (struck by street car).

**Run over by wagons, etc.**

*Struck by vehicles while crossing street.*

**MOODY v. OSGOOD**, 54 N. Y. 488, person having alighted from



street car on thoroughfare where fast driving was the custom, run over by sleigh; judgment for plaintiff for \$2,500 affirmed.

**BROOKS v. SCHWERIN**, 54 N. Y. 343, woman crossing street at night run over by wagon rapidly driven; judgment for plaintiff for \$1,000 affirmed.

**BELTON v. BAXTER**, 54 N. Y. 245, person attempting to cross street between rapidly-moving street car and a rapidly-moving wagon, struck by horse and wagon; judgment for plaintiff for \$1,000 reversed.

**TRACY v. KUNTZ**, 47 N. Y. 663, woman crossing street run over by wagon; judgment for plaintiff for \$1,000 affirmed.

**PHELPS v. WAIT**, 30 N. Y. 78, person crossing street run over by horse and wagon driven suddenly and rapidly into street without driver looking to see if any person crossing street; judgment for plaintiff for \$375 affirmed.

**SHEEHAN v. EDGAR**, 58 N. Y. 631, woman crossing street stopping at crossing to let a vehicle pass, run over by horse and wagon; judgment for plaintiff for \$1,500 affirmed.

**SHEEHY v. BURGER**, 62 N. Y. 558, person about to cross street struck by projecting timber from wagon; nonsuit reversed.

**GROTH v. WASHBURN**, 89 N. Y. 615, person crossing street run over by carriage; judgment for plaintiff for \$550 affirmed.

**STROHER v. ELTING**, 97 N. Y. 102, run over by team; judgment for plaintiff for \$629 affirmed.

**CROCKER v. KNICKERBOCKER ICE CO.**, 92 N. Y. 652, run over by ice wagon.

#### **Collisions between vehicles.**

##### *Collision between carriages.*

**SLOAN v. ELMER**, 64 N. Y. 201, wife of plaintiff injured in collision between his carriage and another negligently driven; question of ownership of defendant's carriage; judgment for plaintiff for \$1,500 affirmed.

##### *Collision between sleighs.*

**BURNHAM v. BUTLER**, 31 N. Y. 480, collision between sleighs; judgment for plaintiff for \$30.

#### **Collisions between street cars and wagons.**

**HEGAN v. EIGHTH AVENUE R. R. Co.**, 15 N. Y. 380, collision between plaintiff's vehicle and defendant's street car; judgment for plaintiff for \$400 affirmed.

**ADOLPH v. CENTRAL PARK, NORTH & EAST RIVER R. R. Co.**, 65 N. Y. 554, collision between wagon and street car; nonsuit reversed;

right of way of street car; vehicles ahead of street car must have opportunity to turn out of way of car.

See also 76 N. Y. 530, where judgment for plaintiff in the Adolph case, for \$5,000 was affirmed.

SEAMAN *v.* KOEHLER, 122 N. Y. 646, street-car conductor injured in collision between street car and brewery wagon; judgment for plaintiff for \$1,000 affirmed.

**Passengers injured in collision.**

See cases in vols. 5 and 6 AM. NEG. CAS., and also in vol. 9, AM. NEG. CAS.

**DEANS, ADM'X *v.* WILMINGTON & WELDON  
RAILROAD COMPANY.**

*Supreme Court, North Carolina, September Term, 1890.*

[Reported in 107 N. C. 686.]

- PERSON LYING ON TRACK RUN OVER AND KILLED BY TRAIN — QUESTION FOR JURY — DUTY OF ENGINEER OF TRAIN.— 1. Where a witness standing upon the side of the track, three-fourths of a mile from the plaintiff's intestate, testified that he saw him lying, apparently helpless, as he thought, along the ends of the cross-ties, beyond the rails, when the engine that ran over and killed him passed the witness, running at twenty miles an hour; *Held*, that the judge should have allowed the jury to determine whether the engineer could, by ordinary care, have discovered, from his elevated position on the engine, that the plaintiff's intestate was lying helpless on the track, in time, by prompt and strenuous effort, to have saved the life of the latter without putting his passengers in jeopardy.
2. If the engineer discovers, or, by reasonable watchfulness, may discover, a person lying on the track asleep, or drunk, or see a human being who is known by him to be insane, or otherwise insensible to danger, or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of human life, and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it.
  3. In such a case the jury were at liberty to exercise their own common sense and use the knowledge acquired by their own observation and experience, without direct testimony from expert witnesses, in determining how many feet or yards of the track the engine must have traversed before the engineer could have put a complete stop to its movement without danger to those who were on the train.
  4. Though the facts may be undisputed, yet, if two reasonable and fair-minded persons might draw inferences from them so different that according to the conclusion of fact reached by one there would be negligence, while that deduced by another would show the exercise of ordinary care, then the issue should be submitted to the jury.

5. The doctrine laid down in *Gunter v. Wicker*, 85 N. C. 310, and followed in a line of cases since, is in conflict with the principle enunciated in *Herring v. Wilmington & Raleigh R. R. Co.*, 10 Ired. (N. C.) 402, and the latter case is overruled (1).

(Syllabus to Official Report.)

CIVIL action for damages, tried before MACRAE, J., at March Term, 1890, of Wayne Superior Court. *Judgment reversed.*

The issues were: 1. Was B. F. Deans killed by the negligence of the defendant? 2. Did he, by his own negligence, contribute to his death? 3. What damage, if any, is the plaintiff's administratrix entitled to recover?

The plaintiff introduced the following evidence: "W. A. Deans testified that deceased was between thirty-three and thirty-four years old. 'I went to the scene of the accident about two P. M. — half an hour after it occurred. The train usually passed that spot about twelve M. I found B. F. Deans (plaintiff's intestate) lying on the ground across the ditch, about ten feet from the track; his head was mashed to pieces, and there were signs on the rails of his having been run over on the side of the track on which the engineer sat in his cab. It is two miles from Goldsboro to the first curve in the road. The place where he was killed was between 300 and 400 yards from the first curve towards Goldsboro; there is gravel of a light color on the footpath on the outside of the rails, and people walk there. It was a showery day. I think I could have seen a man three-quarters of a mile off. Deceased had on a dark overcoat, but I don't recollect the color of his pants. The path I spoke of is between the ditch and the end of the cross-ties, and the roadbed is gravel, with a white sandy gravel. I don't know that it was slippery where he was killed.' Witness further testified as to the value of the life of the intestate.

"On cross-examination, the witness stated that deceased drank whiskey at times; he was not a drinking man during crop-time, but after the crops were laid by, and he had realized therefrom, he would sometimes get on a spree, especially about the Christmas holidays, but did not get drunk every time he came to town. 'When I got to his body on the day of the accident, to wit, December 24th, 1887, one Pate had a small bottle of whiskey, and it looked as if about a drink had been taken out, and there was a broken glass on the ground which had the smell of whiskey

1. See notes of North Carolina cases, at end of this case.

about it. Deceased lived about a mile from the railroad. There is a county road running parallel from Goldsboro in that direction, to the deceased's house, which is a little nearer than the path' (above described).

"P. Taylor testified: 'On December 24th, 1887, I was engaged at the water-station of defendant company; saw deceased early that morning pass the station, going to town; people pass that way; he came back between one and two P. M., and I had some talk with him — say about twenty-five minutes; he went towards home on the railroad, and I went into the section-house and sat down; the last time I saw him he was lying on the roadbed, before the train came, with his feet towards the ditch; I looked towards town, and saw the train coming between the station and water-tank; when the engineer (Morris) came along I motioned to him three times; he was sitting in his seat, looking at me, when I motioned, but he did not seem to understand what I meant; I was standing on the ditch-bank.' (Witness motioned by raising his hand toward the engineer, who was looking out the window of his cab.)

"On cross-examination: 'I think deceased was about three-quarters of a mile from me when I saw him; it had been raining some, the wind was blowing — a cold, rainy day, but not freezing; but a man could see very well, though it was a cloudy day; the rails were wet. When deceased left me near water-station, I saw him about a hundred yards from me, walking on the narrow path outside of the cross-ties; he had a pint tickler of liquor, and offered me some, but I would not drink; it was about two-thirds full, and he seemed to have been drinking, but seemed to know his business, he walked steadily when he left me; he took a drink at the water-station, and another when he left me, in about fifteen minutes; the train that killed him did not stop at the water-tank; I think the train was running about twenty miles an hour; have seen trains run much faster; never saw anyone motion at the engineer; I knew the engineer; had been at the water-tank about twelve months, and as the train passed that day the engineer blew the whistle when it got near to deceased; I could not see the deceased when the whistle blew; when I last saw him he was lying across the road-bed, not between the rails, but between the ends of the cross-ties and the ditch; I did not see his head on the rail; if I had, I would have signaled down the engineer, and stopped the train; I would have done this by

placing my hat on the track; I did not do that because I did not know his head was on the track.'

"Upon the conclusion of the plaintiff's evidence, his honor intimated that he would instruct the jury to find the first issue in the negative, and, in deference thereto, the plaintiff submitted to a nonsuit and appealed."

C. B. AYCOCK, for plaintiff.

W. R. ALLEN and ISAAC F. DORTCH, for defendant.

**Avery, J.** — When this court, in the case of *Gunter v. Wicker*, 85 N. C. 310, 312, adopted the rule laid down in *Davies v. Mann*, 10 M. & W. 546 (1), that "notwithstanding the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages," it was thenceforth aligned with one of two classes, holding widely divergent views as to the effect of contributory negligence on the part of a plaintiff, under certain circumstances, upon his right of recovery. That ruling has been expressly approved in a large number of later cases, and is now firmly grounded as a part of our own system, in so far as it is distinct from that of any other courts where the common law of England prevails. *Farmer v. Wilm. & W. R. R. Co.*, 88 N. C. 564; *Turrentine v. Rich. & Dan. R. R. Co.*, 92 N. C. 638; *Aycock v. Raleigh & Augusta Air Line R. R. Co.*, 89 N. C. 321; *Troy v. Cape Fear, etc., R. R. Co.*, 99 N. C. 298; *McAdoo v. Rich. & Dan. R. R. Co.*, 105 N. C. 140; *Daily v. Rich. & Dan. R. R. Co.*, 106 N. C. 301; *Lay v. Rich. & Dan. R. R. Co.*, 106 N. C. 404; *Bullock v. Wilm. & W. R. R. Co.*, 105 N. C. 180; *Carlton v. Wilm. & W. R. R. Co.*, 104 N. C. 365; *Wilson v. Norfolk &*

1. In *Davies v. Mann*, 10 Mees. & W. 546 (sometimes referred to as the "Donkey Case"), an action for killing an ass, which the declaration alleged to have been lawfully upon the highway when it met its death, it appeared that the animal, fettered by the forefeet had been placed on the highway by the plaintiff, and was killed by being unable to get away from the defendant's wagon, which, without its driver, was coming at a smartish pace along the road. *Held*, that the jury was properly directed that although it

was an illegal act on the part of the plaintiff to put the animal on the highway, still, unless its being there was the immediate cause of the accident, the plaintiff was entitled to recover. In such action it was also stated that the general rule of law respecting negligence is, that although there may have been negligence on the part of the plaintiff, yet, unless he could, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he is entitled to recover.

Southern R. R. Co., 90 N. C. 69; see, also, *Wymer v. Wolf*, 52 Iowa, 533; *Chicago & Alton R. R. Co. v. Kellam*, 92 Ill. 245; *Meeks v. So. Pac. R. R. Co.*, 56 Cal. 513; *Kenyon v. N. Y. Central, etc., R. R. Co.*, 5 Hun, 479, aff'd in 76 N. Y. 607.

In those States where the very opposite view was taken it was held that where one went upon the track of a railroad company, at a point other than a crossing, where the public have a right of way, without special license, he was a trespasser, and could not recover for any injury inflicted upon him through the negligence of such company's agents or employees unless it was wanton. *Mulherrin v. Del., L. & W. R. R. Co.*, 81 Pa. St. 366; *Rounds v. Del., L. & W. R. R. Co.*, 64 N. Y. 129; *Penn. Co. v. Sinclair*, 62 Ind. 301; *Donaldson v. Mil. & St. Paul R. R. Co.*, 21 Minn. 293; *Beach on Contrib. Neg.*; *N. J. Express Co. v. Nichols*, 33 N. J. L. 434, 12 Am. Neg. Cas. 243.

In delivering the opinion in *Manly v. Wilm. & W. R. R. Co.*, 74 N. C. 655, Justice BYNUM foreshadowed, by an intimation, the subsequent adoption by this court, in *Gunter v. Wicker*, 85 N. C. 310, of the principle stated in *Davies v. Mann*, 10 M. & W. 546, and, after it had been approved in so many well-considered opinions, it became apparent that it would be illogical and inconsistent to adhere to the rule laid down in *Herring v. Wilm. & Raleigh R. R. Co.*, 10 Ired. 402, or the interpretation generally given to Judge PEARSON'S language by the leading text-writers of this country (1). In that case, the engineer might have seen

1. In *MANLY v. WILMINGTON & WELDON R. R. Co.*, 74 N. C. 655 (1876), an action for running over and killing a negro girl, about ten years old, who was asleep on the track, judgment for plaintiff for \$300 was reversed (citing and approving *Herring v. Wilm. & Raleigh R. R. Co.*, 10 Ired. 402; *Morrison v. Cornelius*, 63 N. C. 346 (cattle poisoning case), and *Murphy v. Wilm. & Weldon R. R. Co.*, 70 N. C. 437).

In *GUNTER v. WICKER*, 85 N. C. 310 (1881), employee injured by machinery, it was held that "notwithstanding the previous negligence of the plaintiff, if at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant,

an action will lie for damages." (Citing and approving *Doggett v. Richmond & Danville R. R. Co.*, 78 N. C. 305, railroad fire case).

In *HERRING v. WILMINGTON & RALEIGH R. R. Co.*, 10 Ired. (N. C.) 402 (1849), it was held that "the position is not tenable that whatever damage is done, the law implies negligence. But where the plaintiff shows damage, resulting from the act of the defendant, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence, which cannot be repelled but by proof of care, or some extraordinary accident, which makes the case useless. What amounts to negligence is a question of law."

two little negroes, who were lying on the track asleep, according to conflicting testimony, from 200 yards to a half mile, before his engine reached them. He did not actually discover that the children were asleep till he was within twenty-five or thirty yards of them. The testimony showed, also, that the train could have been stopped by the engineer within from 75 to 100 yards. The judge below charged the jury that the railroad company was not liable for the neglect of the engineer to keep a look out along the track except when he was approaching a crossing of a public road over the railway, and was not responsible for his failure to use the appliances at his command to stop the train until he actually saw the children asleep on the track at a distance of twenty-five or thirty yards. This instruction was sustained by the court in the face of the fact that the counsel for the plaintiff cited and relied upon *Davies v. Mann*, 10 M. & W. 546. The court failed even to advert to the doctrine laid down in that case.

It must, therefore, have been the settled purpose of this court, when the doctrine of *Davies v. Mann*, 10 M. & W. 546, was approved, to modify this rule whenever the point should be plainly presented, and that contingency has never arisen until the present time. We have reiterated the principle that where an engineer sees a human being walking along or across the track in front of his engine, he has a right to assume, without further information, that he is a reasonable person, and will step out of the way of harm before the engine reaches him. *McAdoo v. Rich. & Dan. R. R. Co.*, 105 N. C. 153; *Daily v. Rich. & Dan. R. R. Co.*, 106 N. C. 301; *Parker v. Wilm. & Weldon R. R. Co.*, 86 N. C. 221. It is not negligence in an engineer to act, in the absence of specific information, on the presumption that a man who is apparently awake, and is moving, is in full possession of all of his senses and faculties.

But it has been repeatedly held by this court that it is the duty

In the *HERRING* case, *supra*, an action on the case against a railroad company for the negligence of their agent in running over and killing a slave, "where it appeared that the slave was asleep on the track, that the cars were going with their usual speed and at the usual hour, and the engineer, when within a short distance of the

slave, attempted to stop the engine by letting off the steam and reversing the wheels, it was *held* that that was not a case of negligence to subject the railroad company to damages." (Citing and approving *Ellis v. Portsmouth & Roanoke R. R. Co.*, 2 Ired. 138, a railroad fire case.)

of an engineer while running an engine, to keep a careful lookout along the track in order to avoid or avert danger, in case he shall discover any obstruction in his front, whether at a crossing or elsewhere. *Bullock v. Wilm. & W. R. R. Co.*, 105 N. C. 180; *Carlton v. Wilm. & W. R. R. Co.*, 104 N. C. 365; *Wilson v. Norfolk & Southern R. R. Co.*, 90 N. C. 69.

If the engineer discovers, or by reasonable watchfulness may discover, a person lying upon the track, asleep or drunk, or sees a human being who is known by him to be insane, or otherwise insensible to danger, or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of life, and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it. *L. S. & M. S. R. R. Co. v. Miller*, 25 Mich. 279, 12 Am. Neg. Cas. 102; *East. Tenn. & G. R. R. Co. v. St. John*, 5 Sneed (Tenn.), 524; *Houston & T. C. R. R. Co. v. Smith*, 52 Tex. 178; *Isbell v. N. Y. & N. H. R. R. Co.*, 27 Conn. 393; *Meeks v. So. Pac. R. R. Co.*, 56 Cal. 513. For similar reasons we have held that the test of negligence where live-stock is killed or injured by a train is involved in the question whether the engineer, by keeping a proper lookout, could have discovered the animal in time to have prevented the injury. *Carlton v. Wilm. & W. R. R. Co.*, 104 N. C. 365, and *Wilson v. Norfolk & Southern R. R. Co.*, 90 N. C. 69. In *Bullock v. Wilm. & W. R. R. Co.*, 105 N. C. 180, the same criterion was applied where it was alleged that an engineer might have discovered that a wagon was stalled at a crossing in time to prevent injury by stopping his train (1).

The pertinent portions of the testimony in the case before us may be gathered and grouped as follows, bearing in mind always, that if, in the most favorable aspect for the plaintiff there was a question raised that it was the exclusive province of the jury to determine, then there was error. A witness on the roadside could see plaintiff's intestate lying on the side of the track three-fourths of a mile distant. He could not tell, from his position and at that distance, whether he was lying across the rail, but thought his head was on the road-bed beyond the ends of the cross-ties; when the engineer was passing, the witness waved his hand at him as a signal to be watchful. The engineer looked,

1. See the North Carolina cases cited in the opinion in the case at bar, in the notes of cases at end of this case. See also other cases cited in the opinion in the case at bar, reported in vols. 9, 10, 11 and 12 AM. NEG. CAS.



but did not seem to comprehend what was meant. The train was running at the rate of about twenty miles an hour. The witness who made the signal had been engaged at the water-tank for about eleven months, and had been often seen there by the engineer, but had not made his acquaintance.

Could the engineer, by ordinary care, have seen that the plaintiff's intestate was lying, apparently helpless, upon the track, with his head inside the rail, in time to have stopped the train before it reached him? Defendant's counsel contended that there was no testimony offered to show within what distance the engineer, by using all available appliances, could have stopped the train, and, therefore, the jury could not consider the question whether he could have avoided inflicting the injury. With the data furnished by the evidence it was the province of the jury, either with or without additional light from expert witnesses, to determine how many feet or yards of track the train must have traversed after the engineer reversed his engine and blew brakes before he could have put a complete stop to its movements without damage to those on the train. The jury were at liberty to exercise their own common sense, and to use the knowledge acquired by their observation and experience in every day life in solving the question, whether the engineer, in the exercise of due diligence, might have discovered, from his elevated position on the engine, the fact that plaintiff's intestate was lying helpless across the rail, and whether, by prompt and strenuous effort, he could have saved his life, without putting his passengers in jeopardy. *L. S. & M. S. R. R. Co. v. Miller*, 25 Mich. 274, 292 (12 Am. Neg. Cas. 102); *Nehrbas v. Central Pac. R. R. Co.*, 62 Cal. 322. Courts and juries, acting within their respective provinces, must take notice of matters of general knowledge and use their common sense where the evidence makes the issue of law or fact depend upon their exercise. Best on Ev. 262, note F; Wood's R. L. 1064, note.

If the facts had been undisputed, and such that only one inference could have been drawn from them, it would have been the duty of the court to decide whether there was negligence. But upon the testimony before them in this case, the judge should have left the jury to say whether they could deduce satisfactorily from the evidence the inference that the engineer discovered, or could, by ordinary care, have discovered, that plaintiff's intestate was lying, apparently insensible, upon the track, in time to have

avoided the injury, or whether they thought a preponderance of testimony was in favor of the inference that defendant's employees could not have averted the accident by exercising the diligence required by law. *Smith v. Rich. & Dan. R. R. Co.*, 99 N. C. 241; *Troy v. Cape Fear, etc., R. R. Co.*, 99 N. C. 298; *Marietta & C. R. R. Co. v. Picksley*, 24 Ohio St. 654. Men of fair and reasonable minds might have drawn different conclusions from the evidence in this case, although there is no material conflict between the testimony of the witnesses examined, and, therefore, the jury should have been allowed to determine whether the engineer might have ascertained, by keeping a proper lookout, the real condition of the deceased, admitting even that he was drunk, and, by timely exertion, have saved him harmless, without peril to the passengers or other persons on the train. 2 *Thompson on Neg.* 1178 and 1179; *Wood's R. L.*, § 319, p. 1259.

Judge COOLEY (in his work on Torts, p. 670, says: "If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute."

The rule applicable to our case is that, though the facts may be undisputed, yet, if two reasonable and fair-minded persons might draw inferences from them so different that according to the conclusion of fact reached by one there would be negligence, while that deduced by another would show the exercise of ordinary care, then the issue should be submitted to the jury.

We think that his honor erred in declaring the testimony insufficient, in any aspect of it, to warrant the inference on the part of the jury that the defendant might have prevented the injury by the exercise of ordinary care. There must be a new trial.

Error. New trial.

#### ACCIDENTS AT RAILROAD CROSSINGS OR ON RAILROAD TRACKS.

Among the North Carolina cases relating to persons injured at crossings or on tracks, are the following:

*Wagon struck by train.*

IN *MURPHY v. WILMINGTON & WELDON R. R. Co.*, 70 N. C. 437 (1874), where "plaintiff going to defendant's warehouse after goods, stops his wagon on a track nearest the platform, and next to the main track, over which the mail train passes, so near thereto as to be in the way of the engine, it was held, in a suit to recover damages for the destruction of his wagon by the engine, that his loss is the result of his own negligence, and that he had no right to recover.

*Killed while crossing track — Contributory negligence.*

IN *PARKER, ADM'R v. WILMINGTON & WELDON R. R. Co.*, 86 N. C. 221 (1882), the syllabus states the case as follows: "While crossing a railroad track the plaintiff's intestate was killed by a train which had left a station on schedule time and attained a speed of twenty miles an hour; the deceased was working at a steam mill located near the track; when first seen by the engineer he was about 100 feet from the engine, and making no effort to get out of the way; the engineer put on brakes and shut off steam, but gave no signal by bell or whistle. *Held*, that the contributory negligence of the deceased relieves the company of responsibility." *Held*, also, that "one crossing a railroad track must be on the alert to avoid injury from trains that may happen to be passing; and the omission of the engineer to give the precautionary signals of the approach of a train, when it in no way contributed to the alleged injury, does not impose a liability upon the railroad company."

*Run over and killed on track.*

IN *TROY, ADM'R v. CAPE FEAR & YADKIN VALLEY R. R. Co.*, 99 N. C. 298 (1888), action for damages for negligently running over and killing plaintiff's intestate while walking on track, judgment for plaintiff for \$2,000 was affirmed. The syllabus to the report states the points decided as follows:

"Walking upon the track of a railroad company does not, *per se*, constitute such contributory negligence as will bar a recovery for injuries sustained from the negligence of the servants of the road.

"Though the person walking upon the track of a railroad company be technically a trespasser, if he uses due care to avoid injury from the wrongful act of the company he may recover damages for injuries thus sustained.

"Where the public for a long series of years has been in the habit of using a portion of the track of a railroad company for a crossing, the acquiescence of the company will amount to a license, and impose on it the duty of reasonable care in the operation of its trains, so as to protect persons using the license from injury.

"Acts, to constitute contributory negligence, must be the proximate, and not the remote, cause of the injury, and such acts as directly produced or concurred in directly producing the injury.

"The duty of keeping a reasonable lookout is imposed upon those who have charge of railway trains; and a failure to do so will render the railroad company liable for injuries, though the person injured at the time was a trespasser, if he did nothing else to contribute to the cause of the injury.

"Although the person upon whom the injuries were inflicted contributed thereto by his negligence, if the defendant might have avoided them by ordinary care, and did not, damages may be recovered.

"It is required of a railroad company to exercise more care than otherwise necessary, in running its trains in a populous town.

"The damages to which one who has been injured by the negligence of a railroad company is confined to those that are actual.

"Where the evidence in respect to the cause of the injury is conflicting, it should be left to the jury to find the fact under proper instructions from the court."

*Struck by train while walking on track.*

In *MCADOO v. RICHMOND & DANVILLE R. R. CO.*, 105 N. C. 140 (1890), "where plaintiff alleged in his complaint that he was returning from his place of business to his home, along defendant's track, 'as he had been in the habit of doing for several years without objection from the defendant, within the corporate limits of the town of Greensboro, when, owing to the gross negligence of the defendant's servants, he was struck from behind by a locomotive engine, belonging to the defendant, etc., and thrown from the track, was thereby much injured,' and the jury, in response to the first issue, found that the plaintiff was 'injured by the negligence of the defendant, as alleged,' it was held that the verdict meant only that the defendant, by failure to use ordinary care, injured the plaintiff. When, in such case, in answer to a second issue, the jury found also that the plaintiff, by his own concurrent negligence, contributed to cause the injury, it was held that the plaintiff was not entitled to judgment upon the whole verdict."

*Vehicle stalled at crossing — Collision with train.*

In *BULLOCK v. WILMINGTON & WELDON R. R. CO.*, 105 N. C. 10 (1890), accident at railroad crossing, judgment for plaintiff for \$600 was affirmed, the syllabus stating the case as follows: "In an action against a railroad company for the destruction of a portable steam-engine, which had stalled on a crossing, it appeared that the driver,

on seeing a train turn a curve about 1,000 yards distant ran up the track, waving a handkerchief, and that the engineer made no effort to stop the train until within about 300 yards of the crossing, although he noticed the driver waving his handkerchief as soon as he turned the curve, and his fireman called his attention to the obstruction when he was about 600 yards from the crossing. *Held*, that the engineer was negligent, if by watchfulness he could have seen that the road was obstructed in time to stop his train before reaching the crossing. Where it appeared that plaintiff's driver went on the track to see whether any train was approaching before he attempted to cross, the fact that he did not examine the crossing, and that he did not look at his watch to see whether it was about train time, does not constitute such contributory negligence as will prevent plaintiff from recovering, it appearing that the stalling would not have occurred if the crossing had been in good condition."

*Intoxicated person on track — Nonsuit.*

In *DAILY v. RICHMOND & DANVILLE R. R. CO.*, 106 N. C. 301 (1890), it appeared (as per syllabus to the report), that "A, an idiot, and under the influence of liquor, crossed a railroad track at a usual place of crossing in or near a populous town, and was struck and injured by a passenger train, running at about the usual rate of speed of twenty or twenty-five miles an hour. Owing to obstructions near the track, upon another railroad, he could not have seen the train until within six feet of the track he was crossing. It did not appear how near the train was to him, nor whether the engineer saw or could have seen him in time to have stopped. *Held*, that it was not error in the court below to decide that plaintiff could not recover in any view of the case. Even if the engineer had seen him crossing the track in time to stop his train, and did not know of his infirmity, he was justified in assuming that he would get off in time to avert danger, and he was not bound to check its speed. If he (the engineer) carelessly refrained from checking speed, when he might, without injury to the passengers, have averted the injury, he is guilty of negligence, even though the party injured was guilty of contributory negligence." Nonsuit affirmed.

*Defective track — Horse injured.*

In *LAY v. RICHMOND & DANVILLE R. R. CO.*, 106 N. C. 404 (1890), where "in an action against a railroad company for injury to a horse, plaintiff showed that the horse had fallen on defendant's track at a foot crossing on account of his getting his foot hung by a defectively driven spike, and that before he could get him off he was struck by

defendant's dump-car, in charge of its agents, who were called on to stop more than a hundred yards away, the court charged the jury that though the plaintiff may have been negligent in entering defendant's track, said negligence was not the proximate cause of the injury complained of, and they should respond to the second issue, No; it was *held* such charge was erroneous. *Held*, also, that the issue of contributory negligence ought not to have been withdrawn from the jury." Judgment on verdict for plaintiff reversed.

*Collisions and crossings.*

See also *WARD v. WILMINGTON & WELDON R. R. Co.*, 113 N. C. 566, horse killed on track; judgment for plaintiff affirmed.

*BOTTOMS v. SEABOARD & ROANOKE R. R. Co.*, 114 N. C. 699 (1894), child injured on track; imputed negligence discussed; judgment for plaintiff for \$1,200 affirmed.

*RUSSELL v. CAROLINA CENTRAL R. R. Co.*, 118 N. C. 1098 (1896), plaintiff, riding in buggy with her husband, injured in collision at crossing; judgment for plaintiff for \$1,000 affirmed.

*PHARR v. SOUTHERN R'y Co.*, 119 N. C. 751 (1896), person asleep or intoxicated run over on track; new trial granted to plaintiff.

*SYME v. RICHMOND & DANVILLE R. R. Co.*, 113 N. C. 558 (1893), person walking on railroad track killed by train; nonsuit affirmed.

*MATTHEWS v. ATLANTIC & NORTH CAROLINA R. R. Co.*, 117 N. C. 640 (1895), person walking on footpath at end of cross-ties on track struck by train; judgment for defendant affirmed.

*MARKHAM v. RALEIGH & GASTON R. R. Co.*, 119 N. C. 715 (1896), person walking on side path of railroad falling and struck and killed by train; nonsuit affirmed.

*MAYES v. SOUTHERN R'y Co.*, 119 N. C. 758 (1896), collision between train and vehicle at crossing.

*LITTLE v. CAROLINA CENTRAL R. R. Co.*, 119 N. C. (1896), person walking on trestle struck by train; judgment for defendant affirmed. See also former decision in the Little case, 118 N. C. 1072.

See also *Clark v. Wilm. & M. R. R. Co.*, 109 N. C. 430; *Harrell v. Albemarle & Raleigh R. R. Co.*, 110 N. C. 215; *High v. Carolina Central R. R. Co.*, 112 N. C. 385; *Gilmore v. Cape Fear, etc., R. R. Co.*, 115 N. C. 657; *Black v. Aberdeen & West End R. R. Co.*, 115 N. C. 667.

*Animals injured on track.*

*FARMER v. WILMINGTON & WELDON R. R. Co.*, 88 N. C. 564, mule run over on track; judgment for defendant reversed.

*ROBERTS v. RICHMOND & DANVILLE R. R. Co.*, 88 N. C. 560, cow run over on track; judgment for plaintiff reversed on erroneous ruling as to damages.

DURHAM *v.* WILMINGTON & WELDON R. R. Co., 82 N. C. 352, mule killed on track; nonsuit affirmed.

DOGGETT *v.* RICHMOND & DANVILLE R. R. Co., 81 N. C. 459, stock killed on track; judgment for plaintiff reversed.

SCOTT *v.* WILMINGTON & RALEIGH R. R. Co., 4 Jones, 432, cow run over on track.

AYCOCK *v.* WILMINGTON & WELDEN R. R. Co., 6 Jones, 231, cattle crossing track run over by train.

BATTLE *v.* WILMINGTON & WELDON R. R. Co., 66 N. C. 343, mule killed by car.

JONES *v.* NORTH CAROLINA R. R. Co., 70 N. C. 626, horse struck by freight train.

PIPPEN *v.* WILMINGTON, COLUMBIA & AUGUSTA R. R. Co., 75 N. C. 54, mules struck by train.

PROCTOR *v.* WILMINGTON & WELDON R. R. Co., 72 N. C. 579, cow jumping on track and run over by train.

WILSON *v.* NORFOLK & SOUTHERN R'y Co., 90 N. C. 69, mule run over and killed.

WINSTON *v.* RALEIGH & GASTON R. R. Co., 90 N. C. 66, cattle killed on track.

CARLTON *v.* WILMINGTON & WELDON R. R. Co., 104 N. C. 365, mare knocked off railroad embankment and killed.

## MEREDITH *v.* RICHMOND & DANVILLE RAILROAD COMPANY.

*Supreme Court, North Carolina, February Term, 1891.*

[Reported in 108 N. C. 616.]

BOY PASSING ALONG HIGHWAY ON SIDE TRACK STRUCK BY ENGINE — CONTRIBUTORY NEGLIGENCE. — In an action against a railroad company for injury to person by its train, it appeared that the defendant had put in two side tracks which extended into the public road, and that the plaintiff, a bright boy about thirteen years old, while passing along the highway, was struck and injured by an engine while seeking to avoid another coming from the opposite direction. At a short distance on either side of the tracks there was a wire fence. *Held*, that he was not entitled to recover.

(Syllabus to Official Report.)

CIVIL action for damages, tried at February Term, 1890, of the Superior Court of Madison County, before PHILIPS, J. *Nonsuit affirmed.*

"The defendant company, in constructing its road from Hot Springs to Paint Rock, had used what had previously been the public highway, and, just below Hot Springs, had put in two side-tracks, in addition to the main line, extending some distance down the road. The plaintiff, W. J. Meredith, who sues by his next friend, Nicholas Meredith, his father, was shown by all of the witnesses to be a bright boy, about thirteen years old. In going from the house of his father to Hot Springs, he was compelled to pass along the defendant's road where the three tracks were laid down, and at a short distance on either side of said tracks there were lines of wire fence. When on the way from his father's house to Hot Springs, he passed a train apparently heading towards Paint Rock, and not long after, seeing another train coming from Hot Springs, in his front, on the track on which he was walking, he stepped over to the side track on which the train first seen by him was running, but failed to see it approaching him from his rear till it ran against and injured him. He might have stepped off the track and avoided the injury had he seen the train coming up behind him. He was stricken by the engine and his arm was crushed and afterwards amputated. When the plaintiff rested his case, the judge instructed the jury that he could not recover. The plaintiff submitted to judgment of nonsuit, and appealed."

No counsel for plaintiff.

F. H. BUSBEE, for defendant.

**Avery, J.** — Where the engineer in charge of a moving engine sees a human being walking along the track in front of it, if such person is unknown to him and is apparently old enough to understand the necessity for care and watchfulness, under such circumstances, the engineer may act upon the assumption that he will step off the track in time to avoid injury. *McAdoo v. Richmond & Danville R. R. Co.*, 105 N. C. 140; *Parker v. Wilm. & Weldon R. R. Co.*, 86 N. C. 221. The witnesses concur in the statement that the boy who was injured was an intelligent youth, about thirteen years old. In the absence of knowledge or information to the contrary, the engineer was justified in supposing that he would look to his own safety even when trains were moving on three parallel tracks, if there was manifestly an opportunity to escape by walking across the rail to a neighboring side track. *Daily v. Richmond & Danville R. R. Co.*, 106 N. C. 301.

The fact that there was then no other possible route for



persons walking from Paint Rock to Hot Springs would not relieve a man, or boy of his age, endowed with reason and the instinct of self-preservation, from the duty of watchfulness, when he must know and should be always mindful that carelessness will expose him to danger.

Actual or implied license from the railroad company to use the track as a footway would not relieve him from the consequences of failing to exercise ordinary care. The license to use does not carry with it the right to obstruct the road and impede the passage of trains. *McAdoo v. Rich. & Dan. R. R. Co.*, 105 N. C. 140. Where the engineer knows the person on the track, and has knowledge or information that he is of unsound mind, or so deaf that he cannot hear an approaching train, or where the engineer sees, or can, by ordinary care and watchfulness, discover that a human being is apparently lying asleep or helplessly drunk, or an animal or wagon is entangled on the track in his front, even at a public crossing, he cannot relieve the company of liability for injury caused by running over the person or animal, except by showing that he promptly used every available means, short of imperiling the lives of passengers on his own train, to avert the danger. *Deans v. Wilm. & W. R. R. Co.*, 107 N. C. 686; *Bullock v. Wilm. & W. R. R. Co.*, 105 N. C. 189; *Carlton v. Wilm. & W. R. R. Co.*, 104 N. C. 365 (1). The same rule applies where the injury has been done to a child apparently too small to understand the danger, and where the engineer, had he kept a proper lookout, might have averted it without peril to passengers. The boy injured was described by witnesses as bright and "smart," but, if he was *apparently capable of appreciating his peril* or his situation, it is sufficient to relieve the servants of the company from the imputation of carelessness in assuming that he would step aside before the engine reached him. Considerations of public policy, such as the reasonable demand for the speedy transportation of mails, and the proper regard for the safety of passengers, forbid that trains should be stopped for trivial causes or that the lives of those on board should be put in jeopardy, even to avert manifest danger to others.

We concur with the judge below in the opinion that the plaintiff was not entitled to recover, because, by the undisputed facts, considered in any phase presented by them, the plaintiff was

1. See the North Carolina cases cited reported in this volume of AM. NEG. CAS. in the opinion in the case at bar, *re- ante*.

negligent in failing to see the train approaching him from behind, while the servant of the defendant was not in fault in acting on the belief that plaintiff would move out of the way of the engine before it should reach him. There is no error.

Affirmed.

DRIVING ACROSS TRACK — STRUCK BY TRAIN AT STREET CROSSING — DUTY OF RAILROAD COMPANY AT CROSSINGS. — In *COULTER v. GREAT NORTHERN R'Y CO.*, 5 N. Dak. 568 (1896), where plaintiff, while driving a team, was struck and injured by defendant's train at a street crossing, judgment for defendant was reversed, it being held (as per syllabus to the report), that "there is no fatal variance between pleading and proof where the complaint alleges that plaintiff was injured through defendant's negligence at a crossing of the public highway over defendant's railroad track, by being there struck by one of defendant's engines, and the evidence shows that the highway was not legally laid out over defendant's right of way, but that defendant, by its acts and its acquiescence in the public use of the crossing as a public highway, had made such crossing a public highway as to the public, so that it was under the same obligations to take precautions against injuring persons or property at that point as would have rested on it had the highway been laid out in strict conformity with law." It was also held that "the statutory provision regulating the ringing of the bell and blowing of the whistle on approaching a public crossing are not the sole measure of the duty of a railroad company to protect persons and property at public crossings." \* \* \*

HORSE, FRIGHTENED BY NOISE OF TRAIN, RUNNING ON TRACK AND STRUCK BY TRAIN — RAILROAD LIABLE. — In *BOSTWICK v. MINNEAPOLIS & PACIFIC R'Y CO.*, 2 N. Dak. 440 (1892), action for running over plaintiff's horse which, frightened by noise of train, had run upon defendant's track, judgment for plaintiff was affirmed. The syllabus to the official report states the case as follows: "In this State the common-law rule relative to domestic animals is in force, and every man is bound, at his peril, to keep his stock upon his own premises, and is liable for all damages that his stock may do upon the premises of another, whether fenced or unfenced. But the fact that plaintiff's horse was a trespasser upon the railroad track of defendant, without any actual fault of plaintiff, did not relieve defendant, after the presence and peril of the horse were known to it, from the obligation to use

ordinary care in the management of its trains to prevent an injury to the horse." \* \* \*

*Horse getting caught on bridge and run over by train — Railroad not liable.*

In *HODGINS v. MINNEAPOLIS, ST. PAUL & SAULT STE MARIE R. R. Co.*, 3 N. Dak. 382 (1893), action for negligently killing plaintiff's horse which, having stumbled and got caught on the ties of a railroad bridge, was run over by defendant's train, judgment for plaintiff was reversed, for error in refusing to direct verdict for defendant where presumption of negligence was entirely rebutted by defendant. Applying the rule laid down in the *BOSTWICK* case (preceding paragraph).

**HORSE KILLED AT PRIVATE CROSSING — RAILROAD LIABLE.** — In *BISHOP v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.*, 4 N. Dak. 536 (1895), action for negligently killing plaintiff's colt at a private crossing on plaintiff's farm, judgment for plaintiff was affirmed, the question of negligence being properly for the jury. The syllabus states the case as follows: "A colt belonging to the plaintiff was turned loose to feed upon the plaintiff's land, and while attempting to cross the railroad track upon such [private farm] crossing, was killed by defendant's cars. *Held*, 1, that such animal was not, when killed, a trespassing animal, but was lawfully upon the crossing; 2, that defendant in running its trains, was bound to exercise due care in approaching and passing over such private crossing, and is bound to anticipate that animals and persons may be rightfully upon its right of way at the point of crossing. The care must be commensurate with the danger reasonably to be apprehended at the point of intersection." \* \* \*

*Collision between wagon and train at crossing.*

The *BISHOP* case (*supra*) was followed in *JOHNSON v. GREAT NORTHERN R'Y CO.*, 7 N. Dak. 284 (1898), where train collided with wagon at crossing, as to duty of railroad company to look out for persons and property at public crossings.

CLEVELAND, COLUMBUS AND CINCINNATI  
RAILROAD COMPANY v. JOHN CRAWFORD  
ADMINISTRATOR OF WILSON SIPES, DECEASED  
AND ALSO OF ELEANOR SIPES, DECEASED.  
(TWO CASES.)

*Supreme Court, Ohio, December Term, 1874.*

[Reported in 24 Ohio St. 631.]

LOOKING AND LISTENING AT CROSSINGS — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY — INSTRUCTIONS — STATUTORY ACTION — EVIDENCE — COLLISION BETWEEN WAGON AND TRAIN AT CROSSING. — 1. Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train; and the omission to do so, without a reasonable excuse therefor, is negligence, and will defeat an action by such person for an injury to which such negligence contributed.

2. But the omission to use such precautions, by a person injured, will not defeat his action if, by due diligence in their use, the consequence of the defendant's negligence would not have been avoided.
3. Nor will the failure to use such precautions be regarded as negligence on the part of the plaintiff, if, under all the circumstances of the case, a person of ordinary care and prudence would be justified in omitting to use them.
4. In an action for damages for alleged negligence, the question of negligence on the part of the defendant, or of contributory negligence on the part of the plaintiff, is a mixed question of law and fact, to be decided by the jury, under proper instructions from the court.
5. But, if all the material facts touching the alleged negligence be undisputed or be found by the jury, and admit of no rational inference but that of negligence, in such case the question of negligence becomes a question of law merely, and the court should so charge the jury.
6. If, however, the testimony be conflicting, the facts uncertain, or the proper inferences to be drawn therefrom doubtful, in such case it would be error for the court to withdraw the case from the jury, or direct them to return a particular verdict.
7. A party is not entitled to have the jury instructed to render a verdict in his favor, upon a hypothetical statement of the facts of a case, if the statement omits material facts upon which testimony has been offered, and where the finding of the omitted facts against the party would change the result of the case.
8. In an action under the Act of March 25, 1851 (S. & C. 1139), by the personal representative, for damages resulting from the death of his intestate, caused by the wrongful act or neglect of the defendant, it is not competent

for the defendant, in order to defeat the action, to prove that some of the next of kin of the intestate for whose benefit the action is prosecuted, were guilty of negligence which contributed to the injury that resulted in the death.

(Syllabus to Official Report.)

ERROR to the Court of Common Pleas of Morrow County. Reserved in District Court. *Judgments for plaintiffs affirmed.*

"These cases grow out of the same state of facts, and are so essentially similar that a statement of one will suffice for a statement of the other. The original actions were prosecuted by John Crawford, as administrator of Wilson Sipes, and as administrator of Eleanor Sipes, against the Cleveland, Columbus and Cincinnati Railroad Company, under the statute, to recover damages resulting from the deaths of his intestates (husband and wife), which were caused, as was alleged, by the wrongful acts and negligence of the defendant. It is conceded that Mr. and Mrs. Sipes were killed by a train of defendant's cars on June 22, 1867, at the crossing of defendant's road and a public highway, situate about a mile and a half south from the town of Galion.

"The highway leads from the center of the town to the crossing, on a line running due south. From the town to a point twelve or fifteen rods north of the crossing, it passes over a slightly undulating surface; but at that point it descends to a creek bottom, nine or ten feet below the level of the upper plain, and thence continues in the same direction on the lower level until it reaches within a few feet of the crossing, where it ascends on a slight embankment to the level of the railroad track, and, turning to the left, crosses the railroad at nearly right angles.

"The railroad track extends from the eastern portion of the town to the crossing, on a straight line, bearing a few degrees west of south and on a descending grade of ten or twelve feet to the mile. From the crossing northwardly for about 200 feet, the railroad track is two or three feet above the level of the creek bottom; and at this point it enters a cut seven or eight feet deep and about thirty feet wide. This cut extends to the northward, increasing slightly in depth for twenty-five or thirty rods, and thence diminishing in depth, until the grade reaches the level of the upper plain.

"From the crossing northward, the departure of the railroad from the highway is about fifteen feet in a distance of forty feet. All the upper plain between the highway and the railroad was

fenced and under cultivation. On June 22, 1867, the date of the collision, the upper plain land situate between the roads, for the distance of fifty rods from the crossing northward, was occupied by growing rye, and north of the rye field were several tenement houses and other farm structures which more or less obstructed the view from the highway to the railroad.

"About ten o'clock in the morning of this day, the deceased, with three of their children, started from Galion for their home, in a two-horse farm wagon, and drove at the rate of about four miles per hour. Wilson Sipes, the husband and father, was driving the team, and occupied the right side of the front seat on the wagon, with two of the children on his left. Mrs. Sipes occupied the left side of a back seat, with a daughter on her right. Shortly afterward, and while Sipes and his family were thus on the road approaching the crossing, an express train of the defendant left Galion for the south, about seven or eight minutes behind time; and before reaching the crossing the train had attained the speed of not less than forty-five miles per hour. At the crossing the train collided with the wagon, striking it between the front and hind wheels, instantly killing Mr. and Mrs. Sipes. The children escaped with slight injuries.

"It is quite certain from the testimony (the whole of which is set out in the record), that the occupants of the wagon did not see or hear the approaching train until the horses attached to the wagon were within ten or twelve feet of the crossing; and that the officers of the train did not see the wagon until the train was within 300 feet of the crossing.

"Each of these cases has been twice tried to separate juries, with a verdict on each trial against the defendant. The judgments are now sought to be reversed, chiefly upon the grounds that the verdicts upon which the judgments were rendered were contrary to the evidence, and that the court erred in refusing to charge the jury as requested by the defendant below."

ESTEP & BURKE, for plaintiff in error.

F. DOUTHITT and REID & POWELL, for defendant in error.

**Mellvaine, J.** — We will first consider the objections made to the verdict:

1. It is claimed that the testimony did not warrant the findings that the deaths of plaintiff's intestates were caused, in whole or in part, by the negligence of the defendant.

We think the testimony shows that the crossing where Mr. and

Mrs. Sipes were killed was a dangerous one — approached by the railroad from the north through a cut which tended to deprive persons on the highway approaching the crossing of the opportunity of either seeing or hearing an approaching train. Conceding that the train-bell was rung during its passage through the whole length of the cut, it is nevertheless quite certain that the whistle was not used to signal the approach of the train until it had reached a point within 300 feet of the crossing — a distance over which the train passed in four seconds of time.

That the whistle is a more effective signal of warning than a bell cannot be doubted; and where the approach to the crossing is such as this, it is perhaps the only efficient signal. This was a question for the jury; and we can not say that the omission to blow the whistle at a greater distance from the crossing, considering the character of the approach and the rapidity of the train, did not justify the jury in finding that the collision was caused by the negligence of those in charge of the train.

2. It is also claimed that the findings of fact, that the deceased did not contribute to their deaths by their own negligence, were contrary to the testimony. It must be admitted that each jury must have so found, in order to arrive at the verdicts rendered.

In cases where such issues are made, the question of contributory negligence on the part of the plaintiff or his intestate, and of negligence on the part of the defendant causing the injury complained of, should be considered and determined upon the same principles and by the same rules exactly. There is no presumption of negligence, as against either party, except such as arises upon the facts proved. Indeed, the presumption of law is that neither party was guilty of negligence, and such presumption must prevail, until overcome by proof. As a general rule, the existence of negligence on either side is a fact to be ascertained by the jury, under proper instructions from the court. In these cases, the question of contributory negligence was submitted to the jury, with instructions from the court, which, we may say, were unusually instructive and proper. (Whether the defendant was entitled to certain instructions which were refused, will be hereinafter considered.) Each of these cases, upon the whole testimony bearing on the question of contributory negligence, was such, that, in our judgment, it would have been error for the court to have withdrawn it from the jury, or to have instructed them to find that contributory negligence existed.

The jury found the non-existence of such negligence, and we cannot say the finding was clearly against the weight of evidence.

The testimony undoubtedly shows that the deceased were well acquainted with the crossing, and knew its dangerous character; and it also seems clear that they did not, in fact, discover the approach of the train until they had reached, or were within a few feet of the crossing. But to say nothing of the conflict of the testimony, we think the circumstances which surrounded them; the doubt whether they could have heard or seen the approaching train before they did; and as to their exact location at the time it was discovered approaching; their situation, not only in reference to the track and the train, but also as to other conditions which may have required their attention, etc., brought the case so peculiarly within the province of the jury, for the purpose of weighing the circumstances, drawing inferences, and testing their conclusions by the rule of ordinary prudence, that a majority of the court do not feel authorized to interfere with the verdict, especially as the same result has been reached, upon substantially the same state of proof, by four separate and distinct juries.

3. The court refused, in the case of *Wilson Sipes*, to instruct the jury as follows: "That plaintiff's intestate was bound, under any circumstances, without signs or signals, to use his eyes and ears to the extent of his opportunity, to hear, see, and avoid danger, and an omission to do so was negligence on his part, which will prevent a recovery." In refusing to charge the above, as requested, it is claimed there was error. After defining ordinary care, such as the law required the plaintiff's intestate to exercise, the court did charge the jury, however, as follows: "And, therefore, if the intestate, before going upon the crossing, did not look up and down the track to see whether a train was approaching, or if he did not use his ears and eyes so far as he had an opportunity to do so, or if his hearing was defective, or if the noise of the wagon prevented his hearing in any degree, you will take the same into consideration, or any other circumstances calculated to influence the conduct of a prudent person, bearing in mind that whatever the facts and circumstances in the case may be, the proposition you have to determine is, whether Mr. Sipes exhibited ordinary care under the circumstances. If, in the exercise of common prudence and caution, the intestate could have avoided the accident, then the plaintiff cannot



recover. \* \* \* If the intestate, under a mistaken judgment that he could do so safely, after seeing the train, and before going upon the crossing, undertook to cross ahead of the train, this would be such negligence as would defeat a recovery." A similar request was refused, and a similar charge was given in the Eleanor Sipe's case.

In the presentation of these cases, as well as two other cases (Baltimore & Ohio R. R. Co. v. Whittaker, 24 Ohio St. 642, and Marietta & Cincinnati R. R. Co. v. Picksley, 24 Ohio St. 654), which have been considered in connection with them, able arguments and many authorities have been made and cited *pro* and *con*, on the question, whether an omission to look and listen for an approaching train, before attempting to cross a railroad track, is, *as matter of law*, such negligence on the part of the person attempting to cross as will preclude his recovery for an injury done by a passing train while crossing the track (1).

Within the compass to which I intend to limit this opinion, it is impossible to review the cases cited, but nevertheless it is proper to acknowledge the substantial aid we have received from counsel and adjudicated cases, in coming to the conclusions about to be announced.

It is unquestionably true that, ordinary prudence requires a person in the full enjoyment of his faculties and sense to use them, before attempting to cross a known railroad track, for the purpose of discovering and avoiding danger from a passing train; and a failure to do so, without a reasonable excuse therefor, is negligence, and will defeat an action for an injury to which such negligence contributed. This rule does not, in any wise, impinge

1. In BALTIMORE & OHIO R. R. Co. v. WHITTAKER, 24 Ohio St. 642 (1874), person driving across track struck by train at crossing, it was held that "in an action to recover for an injury on the ground of negligence, although the court charged the jury that the plaintiff cannot recover if his own negligence contributed to the injury, yet, in connection with such charge, so instructed the jury that they might reasonably believe that this rule only applies where the defendant is not negligent, such charge is misleading and a judgment for plaintiff based thereon should

be reversed." Judgment for plaintiff reversed.

In MARIETTA & CINCINNATI R. R. Co. v. PICKSLEY, 24 Ohio St. 654 (1874), person injured by train while crossing track at street crossing, it was held that "a charge, which consists mainly of extracts from opinions in reported cases, having no special reference to the circumstances of the case on trial, is objectionable; and where, from the consideration of the whole evidence, it is reasonable to suppose the jury may have been misled by such charge, a new trial ought to be granted." Judgment for plaintiff reversed.

on the doctrine which recognizes the right of a traveler on a public highway to the use of the crossing as co-ordinate with the right of the railroad company, but it results as a necessity from the difference of the modes in which the respective roads are made subservient to the public use.

It must be observed that the rule, as above stated, does not preclude a recovery in all cases where the injured party omits to employ his senses to discover and avoid injury, even though the omission may be regarded as negligent; but only in those cases where the omission *contributes* to the injury. The law in cases of mutual negligence is that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. *Timmons v. Central Ohio R. R. Co.*, 6 Ohio St. 105 (1). It is no case of mutual contribution to an injury, where the injured party could not, by the exercise of due care, have avoided the consequences of another's carelessness.

Again, the failure to look or listen for an approaching train, though such failure may contribute to the injury, cannot, under all circumstances, be regarded as negligent. Whether it is so or not depends on the circumstances of the particular case. For instance, other dangers, as well as those from the approaching train, may be impending, and they may be such as demand the entire attention of the person about to cross the track; and if so, a prudent person would be excused from looking or listening for the train. Indeed, the exercise of ordinary care to avoid an injury is all the law requires; and no one can be held to be negligent who exercises such care. True, when the danger is imminent and human life is at stake, great precaution should be exercised; but this is only ordinary care under the circumstances, because persons of ordinary prudence, under such circumstances,

1. In *TIMMONS v. CENTRAL OHIO R. R. Co.*, 6 Ohio St. 105 (1856), "where the plaintiff, being in the employ of a railroad company, as a brakeman on a gravel train, of his own accord and on his own business, leaves the train while proceeding to its place of destination, and voluntarily attempts to get aboard the same train, on its return, while its speed is not sufficiently checked up to permit this to be done with safety, and in making the attempt, seizes the rim of a gravel box which, through defect of material, breaks, whereby plaintiff falls upon the track and is run over by the train and injured, it was held that these facts show such a want of ordinary care by the plaintiff as will preclude him from a recovery." Judgment for defendant affirmed.

exercise great caution and care. When, therefore, a person about to cross a railroad track, under a given state of circumstances, exercises that degree and amount of care which prudent persons usually exercise under like circumstances, he is without fault. In other words, when the circumstances are such that prudent persons would not ordinarily look or listen for an approaching train, there is no negligence in omitting to look or listen. If this view be correct, it is plain, as a general rule, that, whether contributory negligence existed or not, is a mixed question of law and fact; that is to say, a fact for the jury to find from such testimony as the law regards as competent to prove it; and to be found in accordance with such rules as the court may give to the jury for their guidance.

Where, however, all the material facts in the case are undisputed, or are found by the jury, and admit of no rational inference but that of negligence, or that of due care, it is, no doubt, the duty of the court to say to the jury that, as matter of law, the facts so appearing amount to negligence, or to due care, as the case may be; as it would be the duty of the court to determine, as a question of law, what judgment should be rendered upon a special verdict. But, on the other hand, if the testimony is conflicting, the facts uncertain, or the proper inferences to be drawn from the facts and circumstances doubtful, then it would be error for the court to withdraw the case from the jury, or direct them to return a particular verdict.

From what has been said, it follows that where a party requests the court upon a hypothetical statement of the case, such as would entitle him to a verdict, to instruct the jury to render a verdict in his favor, it is the duty of the court to instruct the jury to so render their verdict, if they find the facts to be as assumed, *provided* the assumed statement embraces all the material facts in the case; but if the statement omits material facts upon which testimony has been offered, and which, if found by the jury to be against the party asking the instruction, would change the result of the case, then the court may properly refuse to give any instruction in relation to the hypothetical case. When tested by the principles above stated, it is clear that there was no error in refusing to give the instruction asked for by the defendant below.

It is not true, as matter of law or of fact, that the plaintiff's intestate was guilty of negligence which would prevent a recovery,

if, *under any circumstances*, without signs and signals, he omitted to use his eyes and ears to the extent of his opportunity, to see, hear, and avoid danger. In the first place, if the use of his eyes and ears to the extent of his opportunity would not have prevented the collision, he was not guilty of *contributory* negligence. In the second place, if the circumstances were such as would have excused a person of ordinary prudence from looking or listening for the approaching train, he was not guilty of negligence at all. In the third place, the qualifying words found in the request — to wit, “to the extent of his opportunity” — do not relieve the proposition from objection. It was claimed on the trial, and the testimony tended to prove the fact, that the deceased had no opportunity to see or hear the train until it was too late to avoid the collision. If the jury had so found the fact to be, the verdict should have been for the defendant, according to the request, although the exercise of due care on the part of the intestate “to the extent of his opportunity,” could not have avoided the consequences of the defendant’s negligence. This, as we above stated, is not the law.

4. The original actions were prosecuted under the statute for the benefit of the next of kin of the intestates. The next of kin were their four children, three of whom were with their parents in the wagon at the time of the collision. On the trial, defendant requested the court to charge the jury that if the persons for whose benefit the actions were brought, were guilty of a want of ordinary care which contributed to the injury, a recovery could not be had for their benefit. This request was properly refused; because, first, the statute gives the right of action to the personal representative upon the same conditions that would have entitled the party injured to an action if death had not ensued. If Mr. and Mrs. Sipes had not died, and had not been guilty of contributory negligence, their right of action for the negligence of the defendant would not have been defeated by reason of the negligence of third persons, although such persons may have stood to them in the relation of next of kin.

Again, the amount recovered in such cases is a gross sum, which the statute directs to be distributed to the next of kin in the proportions provided by law in relation to the distribution of personal estates. If contributory negligence on the part of some of the next of kin would defeat a recovery as to them, it would also defeat a recovery for the benefit of those who in nowise contributed to the injury.

We find no error in these records for which the judgments, or either of them, should be reversed.

Judgment affirmed. WHITE and REX, JJ., concurred. DAY, Ch. J., and WELCH, J., concurred in the syllabus, but dissented from the judgment, on the ground that the verdicts were against the evidence.

## CLEVELAND, COLUMBUS, CINCINNATI AND ST. LOUIS RAILWAY COMPANY v. SCHNEIDER.

*Supreme Court, Ohio, January Term, 1888.*

[Reported in 45 Ohio St. 678.]

- DRIVING ACROSS TRACK AT A TROT — COLLISION AT CROSSING — GATES AT CROSSING — FAILURE TO MAINTAIN SAME. — 1. Where a railroad company uses the tracks of its road across a generally traveled public street in a populous town or city, for its convenience in the switching of trains, cars and locomotives, and the crossing is thereby rendered exceptionally dangerous, it is bound to exercise care proportioned to the increased danger arising from such use of its tracks, to avoid injury to persons using the crossing, and should, in the exercise of such care, as a reasonable precaution for their safety, and means of preserving the legitimate uses of the street, maintain flagmen, or gates and gatemen, at such crossing, or adopt other equally adequate measures for that purpose.
2. A railroad company which, in operating the road with the company owning the same, under an agreement to pay the latter a specified sum, yearly, in excess of the amount to which it is entitled out of the joint earnings, for the use of its tracks and the cost of switching, uses the tracks at such crossing where gates and gatemen are maintained, is bound to the same care in the use thereof as the company owning the road and should anticipate the reasonable effect of the gates, and the gatemen's conduct in their management, on persons approaching the crossing or about to cross, and operate the road at that place, having due regard to such probable effect, and exercise care proportioned to the probable danger to persons using such crossing under those circumstances; and if, while so using the tracks of the road it accepts the services of the gatemen employed by the company owning the road, instead of employing gatemen of its own, they become, for the time being, its servants, for whose negligence it is responsible; and if it does not accept their services, its duty is to place competent gatemen at such crossing, and is responsible for its omission to do so.
  3. When gatemen are maintained at such crossings, it is their duty to observe the tracks and know when, on account of trains or engines thereon, it becomes dangerous for persons to cross, and when it is so, to close the gates and keep them closed to prevent persons from going upon the tracks so long as the danger continues; and when the tracks are clear, or persons may cross without danger from passing cars and locomotives, then to open the gates and keep them open to enable persons to cross, so long as it is

safe for them to do so, but no longer. Persons approaching the crossing or about to cross have the right to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duties, and it is not negligence on their part to act on the presumption that they are not exposed to dangers which can arise only from a disregard by the gatemen of their duties. Hence, an open gate with the gateman in charge is notice of a clear track and safe crossing, and the absence of other circumstances, when the gates are open and the gatemen present, it is not negligence in persons approaching the crossing with teams to drive at a trot, or pass on to the tracks through the open gates without stopping to listen, though the view of the tracks on either side of the crossing is obstructed; nor in such case is there failure, when at a distance of twenty-five feet from the track, to look for locomotives one hundred and fifty feet or more from the crossing, negligence, though they could have been seen.

(Syllabus to Official Report.)

ERROR to the Circuit Court of Hamilton County. *Judgment for plaintiff affirmed.*

"On the 10th of September, 1881, Henry Schneider, while driving his team over the railroad tracks across Freeman street, in the city of Cincinnati, was killed by a locomotive run, managed, and operated, by the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company. His widow, Mary Schneider, was appointed administratrix of his estate and brought her action in the Superior Court of Cincinnati against the railway company, under the statute, for damages, averring that his death was caused by the negligence and wrongful conduct of the company's servants, and that he was without fault. The answer controverted all the allegations of the petition, except that the defendant is a corporation under the laws of Ohio.

"The plaintiff obtained a verdict for \$6,000, but, upon the hearing of a motion for a new trial filed by the defendant, consented to remit \$2,000 and accept judgment for \$4,000. The motion was thereupon overruled and judgment entered accordingly. A bill of exceptions was duly taken purporting to set out all the evidence, the charge of the court to the jury, certain instructions requested by the defendant which were refused, and certain other instructions requested by the defendant which were given. One of the grounds of the motion for a new trial was misconduct on the part of the plaintiff in the action, upon which affidavits were read by both parties, which affidavits are by reference made part of a separate bill of exceptions taken on the overruling of the motion. The railway company prosecuted error to the District Court, and at the April term, 1885, the Circuit Court affirmed

the judgment of the Superior Court, and the reversal of those judgments is now sought in this court.

"The errors relied on relate to the charge of the court, its refusal to give in charge the instructions requested, and misconduct of the plaintiff in the progress of the trial."

MATHEWS, HOLDING & GREVE and H. H. POPPLETON, for plaintiff in error.

CAMPBELL & BETTMAN, for defendant in error.

**Williams, J.** — 1. The refusal of the court to give in charge to the jury the first instruction requested by the railway company, is made the basis of an extended argument to show that it was denied the benefit of the proper rule of law on the subject of contributory negligence. Whether this is so, depends not only upon the accuracy of the instruction requested, but also upon the effect of the charge given.

The charge requested is as follows: "1. It was the duty of the decedent, to approach the crossing at such a rate of speed as would enable him to stop promptly, to avoid danger, and if the decedent approached the crossing on a trot or at such rate of speed as prevented him from discovering the danger in time to avoid it, or prevented him from stopping promptly, or from turning his horses or induced him to hurry across upon discovering the danger rather than attempt to stop, then he was guilty of contributory negligence, and the plaintiff cannot recover, even though defendant's negligence also contributed to the injury."

The court in its general charge on the subject, said to the jury: "The deceased was bound to use the same care in protecting himself, that the defendant company was bound to use, in seeing that no person came to injury by the management of its cars and engines. That is, he was bound to use such care and prudence as a reasonable and prudent man would use, in protecting himself against any injury. It was his duty to use his senses in approaching the railway track, to discover whether or not there was any train or locomotive approaching which might injure him; to make such reasonable use of his eyes and other senses as a reasonable and prudent man would make; and if by the use of them, he could have avoided the injury, then he cannot recover from the company. But if he exercised such care as a reasonable, prudent man would exercise, and if the defendant were guilty of neglect in the running of this engine, and the deceased was killed by reason of that, then the company is responsible."

And at the request of the company, the court further instructed the jury: "That it is the duty of the deceased, in approaching the railroad crossing, to look for the railroad locomotive before attempting to cross; and if his failure contributed to the accident, he cannot recover, even though the defendant's negligence also contributed to the injury. Even though the fireman and the engineer were guilty of neglect contributing to the injury, yet that did not absolve the deceased from exercising the precaution of looking and listening for the approach of trains at such point on Freeman street, as would enable him to discover the approaching train or locomotive; or from approaching the crossing at such gait as would enable him to control his horses promptly."

The instructions given to the jury, omitted nothing of substance contained in the one refused, unless it be that "if the deceased approached the crossing on a trot," he was guilty of contributory negligence. Indeed, the effect of the charge requested is, that it is negligence in law, for a person driving a team to approach at a trot, a railroad crossing under any circumstances.

It is undoubtedly true that persons approaching railroad crossings are bound to the reasonable and prudent exercise of their faculties to discover danger, and to the use of proper care to avoid injury; and, if the omission of either contributes to their injury, they are generally without remedy. But whether they have so exercised their faculties and used such care must depend upon the particular circumstance; for instance, it has been held that the absence of the usual signboard of warning is a circumstance which may properly go to the jury to enable them to determine whether the person attempting to cross the railroad track has been guilty of such negligence as would defeat his recovery. The reason assigned is "that if the traveler is a stranger to the crossing, the want of such warning would be calculated to mislead him into danger; and if he was familiar with the crossing, it might operate as a reminder of danger which he might otherwise forget." And generally "when the question of contributory negligence depends upon a variety of circumstances from which different minds may arrive at different conclusions as to whether the plaintiff exercised proper care and caution, the question should be submitted to the jury under proper instruc-



tions." *Balt. & Ohio R. R. Co. v. Whitacre*, 35 Ohio St. 627 (1).

Approaching a railroad crossing by one driving a team at the speed of a trot, may not necessarily either interfere with the prudent use of his faculties, or prevent due care on his part in crossing. There may be crossings, much used, both by the railroad company and the traveling public, where it would be highly important that persons should cross over promptly and quickly. At the intersection of railroads and highways, where trains are run at long intervals, and few persons travel the road, persons approaching, ordinarily can tell whether it is dangerous to cross, and easily govern their own conduct in crossing. But where several tracks, over which trains and engines are run many times every hour, cross a constantly traveled public street in a populous city, thronged with people and vehicles, unless some expeditious mode of crossing were devised, a confused and hopeless obstruction of the street would result. Hence, at such crossings, gates are put up and gatemen maintained by railroad companies, as was the case at the crossing in question, as a means of safety to the people using the street and for the protection of the railroad companies. It is the business of the gatemen to watch the track, and when clear, to open the gates for persons using the street to cross; and upon the approach of locomotives or trains to close the gates and prevent persons and vehicles from crossing until the tracks are again clear. To persons in the street, who are approaching the railroad tracks, with a view to crossing, an open gate is notice that the track is clear, and that it is safe to cross; but as the gates were liable to be closed at any time, persons crossing would naturally understand they should not linger on the track, but pass over promptly and speedily. Therefore, for a person to drive in a trot onto the railroad tracks while the gates are open, instead of being negligence, might be a high degree of care.

The evidence in this case very clearly shows that Freeman

1. In *BALTIMORE & OHIO R. R. Co. v. WHITACRE*, 35 Ohio St. 627 (1880), collision of train with team and sled at crossing, judgment for plaintiff reversed. It was *held* that "where a person, familiar with a dangerous railroad crossing, in passing over the same, neglects the exercise of any care to ascertain if a passenger train is near, and in consequence of such neglect is injured by a collision with the train, he is guilty of negligence, and the mere fact that he had forgotten that he was in the vicinity of the crossing will not excuse such neglect."

street, at the point it was crossed by the railroad tracks, was a public street of the city of Cincinnati, over which people and teams of all kinds were constantly passing; that several tracks of the railroad were laid across it, which were by two companies used for shifting their cars and locomotives, and gates had been put up, and gatemen were maintained at the crossing; that at the time the deceased approached and drove onto the crossing, the gates were open, and he drove onto the tracks through the open gate on a trot: and we think the court properly left it to the jury to determine whether the deceased under the circumstances of the case, used such care as a reasonable and prudent person would and ought; and the refusal of the court to charge the jury that he was guilty of contributory negligence, if he approached the crossing on a trot, was not error.

2. It is next contended that there was an error in refusing to instruct the jury that: "If the jury find that the gateman was an employee of the Cincinnati, Hamilton and Dayton Railroad Company, and under its control, and operated the gates while the trains of the defendant were passing, simply as the servant of the first-named company, then the defendant could not be charged with his negligence, unless after discovering his negligence, it could, by the exercise of ordinary care, have prevented the effect of such negligence;" and in the charge given on that subject, which is as follows:

"There is one thing further which is to be said about the question as to the agents of the defendant. It is claimed that the defendant is not liable for the acts of the brakeman, gatekeeper, and perhaps other employees, because they were employees of the Cincinnati, Hamilton and Dayton Railroad Company, and not the employees of the defendant company. 'If you find from the testimony that the defendant, the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, was occupying the tracks of the Cincinnati, Hamilton and Dayton Railroad Company by an agreement between the two companies; that the engine which caused the injury was the engine of the defendant company; and that the switchmen, gatekeepers, train dispatchers, and other officers and agents of the Cincinnati, Hamilton and Dayton Company, were, by reason of this agreement engaged in running, or aiding to run the locomotive of the defendant company, then, for the purposes of the movements of that locomotive on the track of the Cincinnati, Hamilton and Dayton

Company, the officers and agents of the Cincinnati, Hamilton and Dayton Company, engaged in that work, were the officers and agents of the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company.' "

It appears from the record that a contract was made between the Cincinnati, Hamilton and Dayton Railroad Company and the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, in 1876, the seventh section of which only was put in evidence, and which reads as follows: "Seventh. The business of said two lines of railroad shall be conducted so as to preserve the existing relations of each with eastern and western connecting roads, and to develop to the fullest extent the business resources of each line; all passenger trains shall be run to and from the Cincinnati depot, party of the first part, and for the use of the same, with the tracks, side tracks thereto, and yards for passenger cars west of Millcreek, and for the cost of switching, the party of the first part, shall be allowed and paid by the party of the second part, in excess of the amount to which each shall be entitled out of the joint earnings, annually the sum of \$5,000, payable monthly."

There was evidence tending to show that the gate at the Freeman street crossing was put up by the former company, and that the gateman was employed by that company, but the engines and trains of the latter company were run and controlled by its own servants and employees, and that the engine which collided with the wagon of the deceased when he was killed, was so run and controlled; and as the negligence charged against the defendant by the plaintiff in her petition consisted in carelessly running the locomotive and managing the crossing, it became a material question whether the defendant could be made responsible for any negligence of the gateman while it was using and operating the railroad. The whole of the agreement between the two companies is not produced, and it was impossible for the court, from the fragment that was introduced in evidence to construe it, or properly determine its effect or the relation really existing between the two companies. From that part of the contract contained in the record, it appears that each company had the right to the equal and joint use of the tracks and depot, and the defendant was to pay the other company for the use of the same with the side tracks and yard, and for the cost of switching, \$5,000 per year in excess of the amount to which it should be

entitled out of the joint earnings. What the arrangement was in regard to the servants or employees of the two companies is not shown. Whether they were to be paid out of the joint earnings, and be under the joint control of the two companies or otherwise, does not appear from that part of the agreement in the record; and the evidence on the subject consisted of the usage and conduct of the companies. It would seem, therefore, that the court properly left it to the jury to determine as a question of fact, whether the defendant was using the tracks of the other company under an agreement with it, and the gatekeeper and other employees of that company were, by reason of the agreement, aiding to run the locomotive of the defendant, which caused the injury. If so, they became, by virtue of the agreement, the servants and employees of the defendant, and it became liable for their negligence. The fact that the gateman was an employee of the Cincinnati, Hamilton and Dayton Railroad Company, and was under its control and so operated the gates while the defendant's trains were passing, does not exclude the idea that, by virtue of the agreement between the two companies, he may also have been then equally under the control of the defendant.

But we do not care to rest the decision of this question solely or mainly upon the foregoing considerations. It is generally held that railroad companies, unless required by statute, are not bound to place gates or flagmen at highway crossings, except under special circumstances, which render the precaution necessary for the public safety. The duty, it is said, does not arise from the number of persons who use the crossing, but it may be created by an exceptionally dangerous mode of crossing adopted by the companies for their own convenience. *Pierce on Railroads*, 352, and cases cited.

"A railway company is not, as a rule, in the absence of a statute requiring it, or of an ordinance of a municipal corporation, bound to maintain gates at a crossing, or keep a flagman there to warn travelers of the approach of trains. But under the maxim *sic utere tuo*, etc., instances may arise where this duty is cast upon them, or of providing some other equally safe mode, by reason of the location of the crossing, and the large number of people crossing it, or where the mode of crossing adopted by the company is exceptionally dangerous." 2 *Wood's Railway Laws*, 1313.

And in *Penn. R. R. Co. v. Matthews*, 36 N. J. L. 531 (1), the chief justice, in delivering the opinion of the court, said: "Under usual circumstances, in the open country, they (railway companies) can run as many trains, and at as great a rate of speed as are consistent with the safety of their passengers. They are not called on to keep flagmen, under ordinary circumstances, at cross-roads, nor to give any other notice of the approach of their trains than those signals that are prescribed by statute. If greater safeguards are requisite for the safety of the community, and those public agents are to be put under greater restrictions in the exercise of their franchises, such contrivances must proceed from the legislative, and not from the judicial power. But while I thus say that these additional burthens cannot be imposed by the courts upon these companies, I also say, at the same time, and with quite as much emphasis, that the companies may, by their own conduct, impose such burthens on themselves. If one of them chooses to build its track in such a mode as to unnecessarily make the use of a public road, which it crosses, greatly dangerous, I think such company, by its own action must be held to have assumed the obligation of compensating the public for the increased danger, by the use of additional safeguards. The reasonable and indispensable implication is that the railway is to be constructed so as not unnecessarily to interfere with the safe use of the public roads; and if a railroad for its own convenience curves its track, as it leaves a deep cut within a few feet of a highway, and also sees fit to put up buildings close along such track, and by these means, or either of them, heightening the danger in the use of such highway, it seems to me very clear that such company must be held to have taken upon itself the duty of averting such danger, by the employment of every reasonable precaution within its power. On such occasions as this, or whenever the situation is embraced within the principle stated, the presence of a flagman, or some equivalent safeguard can be demanded of the company."

The crossing in question has been recognized by the railroad companies using it, as of that exceptionally dangerous character, made so for their convenience in using the tracks as a place for switching cars and locomotives, which created the duty to place gates and gatemen there as a necessary precaution on their part,

1. See the *Matthews* case, reported with the New Jersey cases in this volume, 292, *ante*.

and we think very properly so; for when a railroad company, for its own convenience, lays its tracks across a generally traveled public street in a populous town or city, over which people with their teams and vehicles are accustomed to pass almost continuously, and then uses the tracks as a place for the convenient switching of trains and engines, thus making a yard of a portion of the public street, it is bound to exercise care proportioned to the increased danger arising from such use of its tracks, to avoid injury to persons using the crossing; and common prudence requires that it should, as a reasonable precaution for their safety, and means of preserving the legitimate uses of the street, maintain flagmen or gates and gatemen at such crossing, or adopt other adequate measures for that purpose; otherwise, the street may be permanently obstructed and its uses destroyed.

So long as the defendant used the railroad tracks at this crossing and operated the road, it was incumbent on it to use like care. It should anticipate the reasonable effect of the gates, and the gatemen's conduct in their management, on persons approaching the crossing, or about to cross, and operate the road at that place, having due regard to such probable effect, and exercise care proportioned to the probable danger to persons using such crossing under those circumstances; and if, while so using the tracks of the road, it accepts the services of the gatemen employed by the company owning the road, instead of employing gatemen of its own, they become, for the time being, its servants, for whose negligence it is responsible; and if it does not accept their services, its duty is to place competent gatemen there, and it is responsible for its omission to do so. It might by proper stipulation in the agreement of the railroad company, with which it contracted, require it to furnish competent servants for the transaction of its business, and hold it responsible for any breach of the agreement; but it cannot, by such contract, or by its failure to so contract, shift either the duty it owes to those using the street, or its responsibility to them.

3. The refusal of the court to give the third instruction requested by the defendant is also one of the errors assigned. That instruction is that: "If the jury find from the evidence, that a point on Freeman street, twenty-five feet from the track upon which the locomotive that caused the injury was coming, the decedent seated in his wagon could, by looking in the direction of the approaching locomotive, have seen it at a distance of

150 feet or more from the crossing, and in time to avoid the collision, his failure to discover its approach was negligence on his part, and the plaintiff cannot recover." It is said in the argument that this instruction is adopted from *Bellefontaine Ry. Co. v. Snyder*, 24 Ohio St. 678 (1).

The instructions requested and refused in that case were, that if the plaintiff's daughter, who was killed, and her sister, who was accompanying her, could, by looking, have seen the train and avoided the injury, their attempt to cross without looking was negligence; or, if they were standing on the track without looking to see if a train were approaching, if they could have seen the danger and avoided the injury by looking, that was negligence. This court, in declining to reverse the judgment, because of the refusal to give the instruction requested, said: "While we think the court erred in refusing a new trial on the ground that the verdict is against the weight of the evidence, we see no error in its refusal to give the instructions asked. To give the instructions asked would have been, to a great extent, taking the case from the jury by assuming the existence of material facts in the case. The court could not say to the jury that the failure of the girls to look in the direction of the gravel train when approaching or standing upon the track was carelessness, such as should prevent a recovery without assuming the existence of material facts in the case which it was for the jury to find. The instructions asked, assume the agency of the elder sister, and assume the non-existence of any facts or circumstances rendering it prudent or proper for her to omit looking out. These were matters for the jury, and could not be found or assumed by the court, no matter how plainly they might be proven."

These observations apply aptly to the instruction now under discussion. It assumes that there were no other facts or circumstances in the case which might properly enter into the question of contributory negligence, and in effect excluded from the jury, in its consideration of the question, the fact that gates were maintained at the crossing, and stood open in the presence of the gateman having control, thus signifying a clear track and amounting to an invitation to those about to cross over to do so. Then there was evidence tending to prove that there were at least four tracks crossing Freeman street at the point in question, used by

1. The Snyder case is reported in this volume, *post*.

both railroad companies for switching and shifting locomotives and cars. These tracks intersected at different places, so that the passing of engines along them in the direction of the crossing, and 150 feet away, was not always an indication that they would pass the crossing; and the fact that the gates remained open might easily create the belief by persons ordinarily prudent, that they would not be run to the crossing. At least this was a proper circumstance for the jury in determining whether the deceased exercised proper care, and the instruction requested virtually excluded it from their consideration; and, we think there was no error in refusing it.

4. The only instruction requested by the defendant, which was refused, is the following: "If there were obstructions to the decedent's line of vision in the direction from which the locomotive was coming, that fact made it the more necessary that he should use other means to discover danger, and if he could not avoid danger otherwise than by stopping and listening, then it was his duty before going upon the track to stop and listen, and if his failure to do so contributed to the injury, plaintiff cannot recover."

Much of what has already been said is also applicable to the question raised by this request. As before remarked, persons approaching railroad crossings are bound to the reasonable use of their faculties in discovering and avoiding danger from passing trains, and to that end, it is ordinarily their duty to listen, and, if necessary, stop before attempting to cross; but at crossings where gates are maintained, this may cease to be a duty, or be so only under peculiar circumstances, though the view of the track is obstructed. The placing of gates and gatemen at the crossing may have become but a prudent and proper precaution on the part of the railroad companies, because of the obstructed view of the tracks, and the difficulty on the part of persons approaching in discovering danger from observation merely. At such crossings, it is the duty of the gatemen to observe the tracks, and to know when, on account of approaching trains and engines, it becomes dangerous to cross, and whenever it does, to close the gates and prevent persons from attempting it; and it is as much their duty to observe and know when the tracks are clear, and persons may cross over in safety, and when it is, to open the gates and keep them open for that purpose, so long as it continues to be safe to cross, and no longer. Persons approaching



such crossings have the right to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duty, and govern themselves accordingly, and it is not negligence on their part to act on the presumption that they are not exposed to dangers which can arise only from a disregard by the gatemen of their duties; and hence, when the gates are open and the gatemen present, they are entitled to assume that the tracks are clear and it is safe to cross, and their failure to stop and listen before passing onto the tracks through the open gate, is not, in the absence of other circumstances, negligence which will, in case of injury to them, caused by a passing locomotive, while so attempting to cross, defeat a recovery therefor. This conclusion is sustained by the case of *Baker v. Pendergast*, 32 Ohio St. 494 (1), where it is held, that "a person about to cross a street of a city, in which there is an ordinance against fast driving, has a right to presume, in the absence of knowledge to the contrary, that others will respect and conform to such ordinance; and it is not negligence on his part to act on the presumption that he is not exposed to a danger which can only arise through a disregard of the ordinance by other persons."

It is true that it is further held in that case: "that, if the person crossing the street knew that persons were driving along the street at a forbidden speed, and had full means of seeing the rate at which they were going, the existence of the ordinance would not authorize a presumption which was negated by the evidence of his senses."

The instruction requested by the defendant, now under consideration, assumes that the deceased (*Schneider*) did not see the approaching engine, and could not, on account of the obstructions to his "line of vision, in the direction from which the locomotive was coming," and, therefore, that it was his duty to use other means to discover the danger, and, if necessary, to stop and listen. In the case assumed by the instruction, the presumption upon which he had a right to rely, viz.: that the gatemen were properly performing their duty, and the track was clear, was not negated by the evidence of his senses or in any other way.

1. In *BAKER v. PENDERGAST*, 32 Ohio St. 494 (1877), plaintiff, watching sleighing carnival, leaving sidewalk and on attempting to return slipping and falling in front of defendant's horse, and was run over by defendant's sleigh, judgment for plaintiff below (*Pendergast*) was reversed, and cause remanded to Court of Common Pleas for new trial.

5. The last assignment of error we notice is that based upon the alleged misconduct of the plaintiff. It appears from the bill of exceptions that a drawing, prepared by one of the witnesses, of an engine and the crossing, was admitted in evidence on the trial, and was taken with the papers by the jury on the submission of the case. The misconduct consisted in writing on the back of this paper by one of the plaintiff's counsel, what is characterized by defendant's counsel, as "points and suggestions." If not entirely unintelligible, they are so meagre and obscure, as to render it doubtful whether any person, except the one who wrote them, could make any intelligent interpretation of them, or derive any significance from them. It appears that they were memoranda, written while the counsel for the defendant were making their arguments to the jury, by one of the plaintiff's counsel, as points to be answered by him in the closing argument. He did not at the time know that they were being made on a paper in the case, and it appears that they were not made with any intention to have them go to the jury, and neither the plaintiff nor her counsel knew the jury had them. The delivery of the paper to the jury was attended by no wrongful conduct on the part of the plaintiff or of her attorneys, and the trial court, familiar with the progress of the trial and the conduct of the jury was better able than we, to judge whether the defendant could have been prejudiced thereby. At all events we do not regard it a matter of such consequence as to require the reversal of the judgment.

Some other errors are assigned, but they are substantially disposed of by what has already been said and they need not be more particularly noticed.

Judgment affirmed.

**CINCINNATI STREET RAILWAY COMPANY v.  
MURRAY, ADM'X, AND THE BALTIMORE AND  
OHIO SOUTHWESTERN RAILROAD COMPANY.**

*Supreme Court, Ohio, January Term, 1895.*

[Reported in 53 Ohio St. 570.]

**TRAINS AND STREET CARS AT CROSSINGS — STATUTORY DUTY — OBLIGATION OF STREET-RAILROAD COMPANY — COLLISION BETWEEN STREET CAR AND TRAIN — PASSENGER INJURED — JOINT TORT FEASORS.** — 1. The Act of May 4, 1891 (88 O. L. 582), provides, in substance, that before a street car shall cross over a railroad track at grade, that the street car shall stop not less than ten, nor more than fifty feet from the railroad track, and some employee of the street-railway company shall go ahead of the car, and ascertain if the way is clear and free from danger for the passage of such car, and said car shall not proceed to cross until signaled so to do by such employee, or said way is clear for the passage over said track. In the absence of extraordinary circumstances, it is negligence to cause such street car to cross such railroad track, without stopping the car and going ahead as required by this statute.

2. Whether or not such violation of said statute could be justified or excused, by any circumstances whatever, *quære*.
3. In an action for damages, to make such negligence actionable, it must appear that injury was directly caused thereby.
4. In a trial of an action for damages in such case it is proper for the court to instruct the jury that such failure to stop the car and go ahead, as required by said statute, constitutes negligence, and if the evidence tends to prove that such negligence was the direct cause of the injury, the case should be submitted to the jury. Whether the evidence does or does not so tend, is a question of law for the court.
5. If there is only one employee operating such street car, it is his duty to stop the car and go ahead, and ascertain if the way is clear and free from danger, and if he finds the way clear for the passage over the track, he may cross over with his car without signaling to anyone; but if there are two or more employees operating such car, such signaling is required before crossing.
6. Such stopping, going ahead and signaling, are required at crossings having gates and a watchman, the same as at other crossings.

(Syllabus by the Court.)

Error to the Circuit Court of Hamilton County. Judgment for plaintiff affirmed.

" This action was brought in the Superior Court of Cincinnati, by Alta G. Murray, administratrix of the estate of John L. Murray, deceased, against the Cincinnati Street Railway Company, and the Baltimore and Ohio Southwestern Railroad Company, under §§ 6134 and 6135, Revised Statutes, seeking to

recover the pecuniary injury resulting from his death by the alleged negligence of said two companies.

" The injury occurred on October 4, 1892, at a point where Harrison avenue, in the city of Cincinnati, crosses the double tracks of the railroad. The avenue is traveled and thronged with persons, vehicles and street cars, and crosses the railroad at grade. The railroad has a double track, and operates sidings and yard tracks in the immediate vicinity of the crossing, and seventy-five regular trains pass over this crossing every day, besides many switch trains, so that the crossing is regarded as dangerous. -

" The railroad company had gates at the crossing and a watchman to lower and raise the same, so as to prevent accidents at the crossing. The street car upon which Mr. Murray, who had paid his fare, was a passenger, approached the crossing from the east after dark, in the evening. A train of cars was standing on the east side track of the railroad, near the north line of the avenue, and extending some distance north so as to obstruct the view of the main track from persons on the avenue, east of the railroad. As the car approached the railroad crossing, the driver of the car checked his horses and brought his car nearly to a stop, something less than fifty feet from the railroad, and the conductor of the street car was about to step from the car and go forward to see whether it was safe for the street car to cross, when the watchman, in charge of the gates, called to the employees in charge of the street car, to ' come ahead ' or ' come on. ' The gates at this time were in an upright position, indicating that it was safe to cross the railroad tracks. And the watchman, who gave the signal to ' come ahead, ' was at the same time sounding the gong signal, which was attached to the gates, and was so sounding for the purpose of either indicating to persons about to cross, that they should cross promptly, and that it was safe to do so, or to warn them that a train was coming and not to attempt to cross, the evidence on this point being conflicting. The driver and conductor of the street car listened and heard no sound of a locomotive bell or whistle or other sounds of an approaching train, and their view from the main track was obstructed by the cars upon the side track. Thereupon the conductor resumed his place on the rear platform of his car, and the driver, in pursuance of the invitation and signal from the watchman to ' come ahead, ' started the street car and attempted to cross the railroad tracks. When the street car was partly across the railroad tracks, and it

was too late to avoid a collision by stopping the street car, a 'cut of cattle cars,' composed of two or three box cars, loaded with live stock, and being pushed by an engine from behind, came down the west track of the railroad, running at the rate of twenty or twenty-five miles an hour, and blowing no whistle, ringing no bell, and displaying no signal light, approached the crossing. The driver of the street car then made every effort to get his car across the tracks and avoid a collision, but the railway train struck the rear platform of the street car, after the whole of said car, except the rear platform, had passed over the crossing, and thereby Mr. Murray received injuries from which he shortly thereafter died.

"The case was tried to a jury, and a verdict rendered against both defendants. A motion was made for a new trial, which was overruled, and judgment entered on the verdict. On petition in error to the Circuit Court, which then had jurisdiction, the judgment was affirmed. Thereupon the case was brought here by petition in error on part of the street-railway company, and by cross-petition on part of the railroad company."

J. W. WARRINGTON and E. W. KITTREDGE, for plaintiff in error.

BATEMAN & HARPER and HARMON, COLSTON, GOLDSMITH & HOADLEY, for defendant in error.

**Burket, J.** — The errors assigned and relied upon, arise upon the charge of the court to the jury as given, and refusal to charge as requested. The general charge as to the liability of the street-railway company in so far as the points made in argument are concerned, is embraced in the following: "The Cincinnati Street Railway Company, at the time and place mentioned, through its agents or servants, was bound to exercise the highest degree of care which prudent men are accustomed to employ under similar circumstances, and to the end that the passenger might be safely carried to the end of his journey, however, without being an insurer of the safety of the passenger, for that the company did not undertake to do. Nor does it under the law stand as an insurer of the safety of the passenger."

"If the jury find from the evidence that the defendant, The Street Railway Company, is a common carrier of passengers, and that on the 4th day of October, 1892, the plaintiff's intestate was a passenger on the car of the defendant, and having paid his

fare, it was the duty of the said defendant to carry him safely to the point of his destination without injury, and when it is shown that the defendant failed to carry the plaintiff's intestate safely to the place of his destination, the failure puts the defendant *prima facie*, or affirmatively, in the wrong, and the burden of proof devolves upon the defendant to show that the injury was the result of another independent and intervening cause, and that the injury might not have been prevented by the exercise of that high degree of care to which we have alluded, and which prudent men are accustomed to employ under similar circumstances.

"The laws of Ohio make it the duty of a street-railway company to cause their cars to come to a full stop, not nearer than ten nor further than fifty feet from the tracks of a steam railway at a crossing, before proceeding to cross; to cause some person in its employ to go ahead of the car and ascertain if the way is clear and free from danger for the passage of such street car, and not to proceed to cross until such action has been taken by such persons so employed and the way is clear for their passage over the said tracks. If you find that the death of the plaintiff's intestate resulted from the omission of such duty, or could have been avoided by the observation of said duty, you may consider it as the act of negligence on the part of the railway company, because of the invitation of the steam railway to come across, they should look and see that the way was clear, that does not relieve the street-railway company from its duty to its passengers as I have described."

The plaintiff in error excepted to the last of the above propositions of the general charge.

The court also charged the jury that both railroad and street railway might be found guilty of the wrongful act causing the injury, if both were concurrent in point of time and fact, and the wrongful act of each was the direct and proximate cause of the injury.

At request of plaintiff below, the court gave the following special charges, to which plaintiff in error excepted:

"1. The statute of Ohio made it the duty of The Cincinnati Street Railway Company to cause its car to come to a full stop not nearer than ten feet nor further than fifty feet from the crossing, and before proceeding to cross said steam-railway tracks to cause some person in its employ to go ahead of said car and ascertain if the way was clear and free from danger for the passage of

said street car, and not to proceed to cross until signaled so to do, by such person so employed, as aforesaid, or said way was clear for their passage over said tracks; and I charge you that the omission of such duty is negligence on the part of said defendant, which will render it liable in damages, if you find that the death of the decedent resulted from such omission, or could have been avoided by the observance of this duty.

" 2. So far as the street-railway company is concerned, the fact, if you shall find it so to be, that the gateman neglected to let down the gates, or invited the street-car driver to come ahead, does not excuse the company from its failure to send a person in its employ forward to examine the track, and to stop until such person shall have notified them to proceed."

The street-railway company then requested the following five special charges, which the court refused to give, and exceptions were duly taken.

" 1. If you find that the defendant steam-railway company, in obedience to an ordinance of Cincinnati, had been, and at the time of the accident was, maintaining gates with a watchman at the crossing in question, then I charge you that employees of the defendant street-railway company were not required at the same time and crossing first to stop the street car and then go forward to look for the approach of steam trains, but that such employees had the right to rely on the watchman with the gates of the steam railway company.

" 2. If you find that as the car of the street-railway company approached the steam tracks in question, the gateman of the defendant steam-railway company kept his gates open and by the use of his gong and oral invitation indicated to the driver of the street car that it was safe to, and he should drive across the track, and that the street-railway employees, while in the exercise of their senses of sight and hearing did not know of such an approach of a train as to make it unsafe to cross the tracks, then I charge you that the street railway employees were excused from stopping their car or going forward in advance of the car to examine for approaching trains, and that they were justified in accepting such invitation of the gateman and attempting to cross the tracks.

" 3. If the jury find from the evidence that the gates established at the steam-railroad crossing were open at the time the street car approached the crossing; the open gates were an affirmative

and explicit declaration that it was safe to cross, and that no train or locomotive was approaching the crossing near enough to make it unsafe for the employees of the street-railway company to act upon the invitation to cross; and if you find that the employees of the street-railway company, in the use of their senses of sight and hearing did not know of the approach of a train, and were not otherwise warned or advised of its near approach, so as to make it unsafe to cross, they were not guilty of negligence in acting upon the invitation extended to them by the open gates.

"4. If you find that Harrison avenue and the steam-railroad track, at the point where this collision occurred, was a crossing much used both by the steam railroad and the street railroad and the traveling public generally, and the number of trains using the steam road and others using public conveyances and traveling along the street, made it necessary and highly important for safety in crossing, that persons driving wagons and public conveyances, should cross over promptly and quickly, so that the passage of steam-railroad trains and of persons desiring to use the street crossing should not be unduly delayed and hindered, and in order to avoid this you should find that it was necessary for the defendant's street car to cross over promptly and speedily, then I charge you that unless the employees of the defendant street-railroad company were made aware, or by the exercise of their senses of sight and hearing could have ascertained, that a train was approaching before they went upon the crossing, so near as to make it unsafe to cross, you may find that they were not negligent in acting upon the invitation presented by the open gates, or such other invitation, if you find any was given, by the employee of the steam railroad in charge of the gate.

"5. If the jury find that the defendant street-railway company's car was slowed up as it approached the tracks of the defendant Baltimore and Ohio Southwestern Railway Company, on Harrison avenue, and that thereupon and before the street car reached the side track of the steam railroad, the gateman of the steam-railroad company personally called to the employees, in charge of the street car, to 'come ahead,' or called to them in any other words to that effect, and in response to which the street car went ahead, then I charge you that there can be no recovery against the street-railway company."

Section 2 of the Act of May 4, 1891, 88 O. L., provides as follows: "Whenever the tracks of any street railroads in this State



cross the tracks of any steam railway at grade, the street-railway company operating said line of cars shall cause their street cars to come to a full stop not nearer than ten feet nor further than fifty feet from the crossing, and before proceeding to cross said steam-railway tracks, shall cause some person in their employ to go ahead of said car or cars, and ascertain if the way is clear and free from danger for the passage of said street cars, and said street-railroad cars shall not proceed to cross until signaled so to do by such person so employed as aforesaid, or said way is clear for their passage over said tracks." The penalty for a violation of this section is \$100, together with liability in damages to the party injured, on part of both the street-railway company and its employee.

On part of the street railway, it is contended that the above statute should be read *in pari materia* with that section of the railroad statute requiring gates and a watchman to be maintained at dangerous crossings, and that when the gates are open and such watchman is at his post and signals the street car to come on and cross, that the employees of the street railway are thereby relieved and excused from stopping the car and going forward to ascertain whether the crossing is clear and free from danger.

We do not agree with this view. The watchman is placed at his post to prevent accidents and injuries at the crossing, and he and the railroad company are chargeable only with ordinary care, while the street-railway company is a carrier of passengers, and as such is chargeable with a much higher degree of care.

The street-railway statute is for the protection of the lives of its passengers, and in addition is highly penal in its provisions, and by its terms makes no exception of crossings where there are gates and a watchman. It is, therefore, clear that the car must stop and the employee go forward, whether there are gates and a watchman or not.

It is also contended on part of the street-railway company, that the court erred in its general charge, and in the special charge, in which the court called the attention of the jury to the above statute and the duty thereby imposed of stopping the car and going forward to see that the crossing is clear, and then added: "If you find that the death of the plaintiff's intestate resulted from the omission of such duty, or could have been avoided by the observation of said duty, you may consider it as the act of negligence on the part of the railway company, because of the

invitation of the steam railway to come across they should look and see that the way was clear, and does not relieve the street-railway company from its duty to its passengers as I have described."

The case was argued, both on brief and orally, as if the court had charged that the mere failure to stop the car and failure to go forward to see that the crossing was clear, constituted, *per se*, such actionable negligence as to warrant a recovery; and it is strongly urged that the question, as to whether such failure to stop the car and go forward, was or was not negligence on part of the street-railway company, should have been submitted to the jury. Four of the five requests to charge are also in line with this theory. But an examination of the above part of the general charge shows that the court only decided that in this case it was negligence to fail to stop the car and go forward, and then, as to whether or not the injury was caused by such negligence, was submitted to the jury. The language of the court is, "If you find that death resulted from the omission of such duty or could have been avoided by the observation of such duty." This clearly leaves to the jury the question as to whether or not the injury was caused by the negligence of not stopping the car, and not going forward as required by statute.

True, the effect of the charge was that the failure to stop the car and go forward was negligence. The charge in that regard was strictly correct. The statute requires that the car stop and that an employee go forward and ascertain if the way is clear, and a failure to obey the statute in this regard is negligence, but in an action for damages, and not for penalty, it is not actionable negligence, because to make such negligence actionable, some injury must have been directly caused thereby. In such case, if there is nothing which in law tends to justify or excuse such negligence, it is not only right, but the duty of the trial judge, to say to the jury that such omission is negligence, and then, if the evidence tends to prove that such negligence was the direct or proximate cause of the injury, to submit that question to the jury; if the evidence does not so tend, a verdict should be directed for the defendant. Whether or not the evidence so tends, is a question of law for the court, and not of fact for the jury.

It may well be doubted whether, under any circumstances, the street-railway company would be justified or excused for violating

the statute, but that question is not necessarily involved in this case, as the facts shown at the trial did not even tend toward an excuse or justification.

The trial court in this case said to the jury, that if they found that death resulted from the omission of such duty, or could have been avoided by the observation of such duty, that the street-railway company would be liable. The true test in such case is, that the injury resulted directly from the negligence complained of, or was directly or proximately caused thereby; but in the absence of a request to make the charge more specific in that regard, we cannot say that the street-railway company was prejudiced by the charge as given.

It is urged that this failure of duty on the part of the street railway company, was not averred in the petition, and that, therefore, it cannot be relied upon as a ground of recovery. *B. & O. R. R. Co. v. Whitacre*, 35 Ohio St. 627, 629 (1). The statute prescribes the care to be taken by the street-railway company at a crossing, and the terms of the statute need not be pleaded, but in this case they were pleaded, and were, on motion, very properly stricken out. The petition avers that: "The said street-railway company, without exercising any care on its part, negligently and carelessly caused said car, on which said decedent was riding, to be drawn across said steam-railroad tracks." If it drove on *without exercising any care*, it certainly did not stop its car nor go forward, because that would have been exercising *some* care, in fact, such care as the statute requires. The averment of *no care* is broad and sweeping, and perhaps indefinite and uncertain, but all this might have been cured by motion.

It is also urged that it is not always necessary to stop the street car and go forward when a railroad crossing is reached, and that the last sentence of the section shows that if the track is clear, the car may proceed without stopping and without any one going forward. The section of the statute in question, after providing for the stopping of the street car and an employee going forward to ascertain that the way is clear and free from danger, provides as follows: "And said street-railroad cars shall not proceed to cross until signaled so to do by such person so employed as aforesaid, or said way is clear for their passage over said tracks."

In many cities there is but one employee on a street car, and while he is bound to stop his car and go forward and ascertain if

1. See note of the *Whitacre* case, page 432, *ante*.

the way is clear and free from danger, he cannot well signal to himself to proceed, and in such case he shall not proceed to cross with his car, "until said way is clear for their passage over said tracks." This last sentence is clearly applicable only to cases where, after one goes forward, there is no one left in charge of the car to whom a signal can be given. But this does not excuse the employee from stopping his car, and going forward and ascertaining whether the way is clear and free from danger.

The railroad company in its brief, asks a reversal of the judgment against it only in case the judgment against the street-railway company should be reversed, but in oral argument it is urged that the judgment against the railroad company should be reversed, and that against the street-railway company affirmed. We find no error in the record prejudicial to either company, and therefore, the judgment against both companies is affirmed.

Judgment affirmed.

## PENDLETON STREET RAILROAD COMPANY v STALLMANN, ADM'X, ETC.

*Supreme Court, Ohio, December Term, 1871.*

[Reported in 22 Ohio St. 1.]

**COLLISION BETWEEN WAGON AND STREET CAR — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS.** — In an action for negligence wherein ordinary care is the degree of diligence involved in the issue, and contributory negligence is set up as a defense, it is error to charge the jury that if the plaintiff, by his own fault, has contributed to his injury, the defendant must then show that he was without fault himself; and that no man can be shown without fault unless he has done all in his power to avoid the injury.

If the instructions to the jury on a question of law involved in the issue be manifestly erroneous, the judgment should be reversed, unless it clearly appears from the whole record that the party against whom it was committed could not have been prejudiced thereby.

Although an erroneous instruction given to the jury be afterwards qualified by using apt words to express the true rule on the subject, yet if, upon the whole charge, it be uncertain what the rule given, or intended to be given, in fact was, the judgment should be reversed, for the reason that the jury may have been misled thereby.

As a general rule, where a new trial is granted on a motion to set aside a verdict and grant a new trial, and a new trial and judgment are afterwards had in the case, a reviewing court, upon a proceeding in error to reverse the last judgment, will not review the action of the court below in granting a new trial.

(Syllabus to Official Report.)

ERROR to the Superior Court of Cincinnati. *Judgment for plaintiff reversed.*

" The original action was brought in the Superior Court of Cincinnati, by Rebecca Stallman, administratrix of Henry Stallmann, under the act of March 25, 1851 (S. & C. 1139), against the Pendleton Street Railroad Company, to recover damages from the defendant for causing the death of her intestate by wrongful act and neglect.

" The defendant made answer as follows: ' 1. That it was not guilty, by its agents, servants, or otherwise, at the time of the alleged injury to the plaintiff's intestate, of any such neglect, unskillfulness or carelessness, as the plaintiff in her petition has asserted. 2. That the injury suffered by the plaintiff's intestate, as in her petition alleged, was caused by carelessness of said intestate, and not by any fault of the agents or servants of this defendant, or any defect in its cars, machinery or equipments.'

" The cause was submitted to the jury at Special Term, and a verdict was rendered for the plaintiff for \$4,500.

" During the progress of the trial, the defendant excepted to the charge of the court as given to the jury, and to its refusal to charge as the defendant requested. The defendant then moved the court to set aside the verdict and grant a new trial for the following reasons: 1. Because the court refused to instruct the jury in matters of law, pertinent to the issue, as requested by defendant's counsel. 2. Because the court erred in its instructions to the jury in matters of law. 3. Because the verdict is contrary to law. 4. Because the verdict is not sustained by sufficient evidence. 5. Because the damages are excessive. This motion was overruled, to which the defendant excepted and filed his bill of exceptions, containing all the testimony, the charge of the court as given, and the special requests of the defendant, which the court refused to give, together with the exceptions taken by the defendant during the progress of the trial. And thereupon judgment was rendered on verdict in favor of plaintiff."

(In the statement of facts, the whole case is practically presented, giving the charges of the court and the refusals of requested instructions, together with the exceptions, which, however, are sufficiently stated in the opinion rendered in the Supreme Court, and for that reason the long statement is here omitted.)

" Subsequently the Superior Court, in General Term, upon

proceedings in error, affirmed the judgment rendered at the Special Term; and this action is prosecuted by the defendant in the original action, to reverse the judgment of affirmance, rendered at General Term, and also the judgment at the Special Term, for the reasons set forth in its motion to set aside the verdict, and grant a new trial."

G. E. PUGH, for plaintiff in error.

STALLO & KITTREDGE, for defendant in error.

**McIlvaine, J.** — In disposing of this case, we will confine ourselves chiefly to questions arising upon the charge of the court as given to the jury at the time of the last trial, at Special Term.

As to the facts of the case, we intend to express no opinion, further than to show that the testimony before the jury was such as to require the court to instruct the jury as to the law concerning contributory negligence, as well as to the degree of care required of the defendant below in the management of its business, for the want of which the law will hold it responsible in damages in cases where injury to others (than passengers) results therefrom.

The defendant below, at the time of the occurrence which resulted in the death of the plaintiff's intestate, was engaged in the management of a street railroad in one of the streets of Cincinnati, and in running cars thereon, drawn by horses, for the transportation of passengers. Henry Stallmann was not a passenger thereon, but was a teamster engaged in driving his wagon and team of mules along the street upon which the defendant's railroad was located. There were three other teams in company with Stallmann, all loaded with pork, two before and one behind him. These several teams had occupied the track of the railroad before the approach of the defendant's car, at which time they left the track, on the same side; and the car had passed the hindmost team before it had arrived in close proximity to Stallmann and his team. The car and the several teams were traveling in the same direction; and at the time and place where the car overtook Stallmann and his team (at which time he was walking and driving at the side of his wagon, next to the car), there was barely, and possibly not at all, sufficient space between the car and wagon for him to stand or walk in. By some means or other, while in this position, Stallmann was prostrated upon the street, and received the injuries of which he, shortly afterward, died. Both

the driver of the car and Stallman, before the injury was inflicted, knew the situation and condition of each other and of their respective vehicles.

Whether the injury which caused the death of Stallmann was the direct result of a stroke by the car, causing him to fall, or by being run over by his own wagon, after accidentally falling, was matter in dispute at the trial.

We purposely omit stating the tendency of the proof in more detail, as the above outline is sufficient to a fair understanding of the main questions considered in this case.

The rules of law which govern in actions for negligence in cases like the present, have been fully and clearly settled by former decisions of this court. Not only as to what constitutes culpable negligence on the part of the defendant, but also as to what amounts to contributory negligence on the part of the injured party, the general effect of such contributory negligence, and the circumstances under which the injured, is in law, relieved from its consequences. So far as it is possible to abstract the principles of law from the facts which constitute actionable or contributory negligence, and to define and apply them, we have little to do, except to refer to those decisions.

"In an action against a railroad company to recover damages caused to third persons by the train while in motion, no recovery can be had unless the employees were, at the time, guilty of negligence or want of due care; nor if the party injured was also guilty of negligence contributing directly to the injury. The degree of care required in such cases of the employees, and also of the party injured, is merely ordinary care and prudence, the perils to be encountered, and all other circumstances under which the injury was inflicted and received, being considered." *Cleveland, Col. & Cin. R. R. Co. v. Terry*, 8 Ohio St. 570 (1). And Peck, J., in delivering the opinion of the court, on page 581, defines ordinary care to be "that degree of care which persons of ordinary care and prudence are accustomed to use and employ under the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination, having due regard to the rights of others and the objects to be accomplished."

In *Kerwhacker v. Cleveland, Col. & Cin. R. R. Co.*, 3 Ohio

1. The *Terry* case is reported in this volume, page 467, *post*.

St. 172, 195 (1), the following is laid down : " That the general rule is, that where the parties are mutually in fault, or, in other words, where negligence of the *same nature* in each party has co-operated to produce the injury, the party sustaining the loss is without remedy, but that this rule is subject to the following qualifications:

" First. The injured party, although in the fault to some extent, at the same time may, notwithstanding this, be entitled to reparation in damages for an injury which could not have been avoided by ordinary care on his part.

" Second. Where the negligence of the defendant, in a suit upon such ground of action, is the *proximate* cause of the injury, but that of the plaintiff only *remote*, consisting of some act or omission not occurring at the time, the action is maintainable.

" Third. Where the party has in his custody or control dangerous implements or means of injury, and negligently uses them or places them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass or otherwise somewhat in the wrong, sustains an injury, he may be entitled to redress.

" Fourth. And where the plaintiff, in the ordinary exercise of his own rights, allows his property to be in an exposed or hazardous position, and it becomes injured by the neglect of ordinary care and caution on the part of the defendant, he is entitled to reparation."

It will be observed that a case wherein the fault of the defendant is malicious, or his neglect is so wanton and gross as to be evidence of voluntary and wilful injury on his part, and the fault of the injured party is merely the want of ordinary care, does not fall within the scope of the general rule, the faults not being of the same nature. And I will add that, in my opinion, the qualifications attached to the rule, in that case, should be regarded as illustrations of, rather than exceptions to, the rule; but, however that may be, we find in *Timmons v. Central Ohio R. R. Co.*, 6 Ohio St. 105, 108 (2), that the rule as there laid

1. The ruling in the *Kerwhacker* this volume. The extract given in the case, 3 Ohio St. 172, 195, has been followed in numerous cases, not only in opinion in the case at bar is paragraph 8 of the syllabus to the *Kerwhacker* Ohio, but in other jurisdictions. It case.  
was not an action for personal injuries, but a stock-killing case, and hence it is not deemed necessary to report same in

2. See note of the *Timmons* case, page 425, *ante*.



down, and the qualifications attached, were approvingly cited and referred to in the opinion of the court.

Assuming, therefore, that the foregoing is the settled law of this state in cases of this kind, how stand the instructions of the court in the charge under consideration?

Passing for the present so much of the charge as relates to the respective rights and duties of the defendant and the general public, in relation to the use of the street, and to each other, the court instructed the jury as follows: "Gentlemen, the rule is well stated by all the counsel, that if there is fault upon both sides, there cannot, as a general rule, be a recovery; but if there is upon one side, and yet the other party could have avoided the accident, it is his duty to do so. It would be imprudent, it would be the height of almost madness, for a man to pass across the street when he saw a wagon at full speed a short distance from him. He would doubtless be in fault, but because that wagoner, who has charge of the horses and controls them by the reins, sees this man thus imprudently placing himself in the way of danger, he has no right to run over him if he could avoid it. If there is room to the right hand or to the left, and he has the power to do so, he must pursue that course. So, you see, the rule that the party who complains must show himself without fault is subject to another rule, that the party who is charged with having committed the injury must show that he is without fault himself. And no man can be shown without fault unless he has done all in his power to avoid the injury.

\* \* \* \* \*

"Here you will look at all the circumstances of the case. Was it in the power of this driver, having passed the first wagon, to have avoided the second one?

"This is the whole case. If you find for the plaintiff, the question of damage will be altogether with yourselves. You can take into consideration the same elements you would if the party were alive, except the law allows nothing for consolation, as it is termed, or for the loss of those domestic pleasures which grow out of the marital relation. They die with the party, and all the law allows is mere compensation for the support of the wife and her daughter, not exceeding a certain sum."

Thus the regular charge to the jury ended, and, if we rightly understand the force of the language used, the jury must have been impressed with the idea that contributory negligence on the

part of the plaintiff's intestate would not defeat her right to recover, even though such negligence had reached "the height of almost madness," unless the defendant had shown that its agents had exercised, at the same time, all the care and caution within the scope of human foresight and possibility.

Such is not the law, as we have shown above. But we doubt whether the learned judge who delivered the charge so intended to give it. We doubt it, because when the defendant afterward excepted to the question: "Was it in the power of this driver, having passed the first wagon, to have avoided the second one?" as propounded to the jury, the court then qualified it by adding, "With reasonable care." The question thus qualified would have been a proper one for the jury under the fourth qualification to the general rule as given in Kerwhacker's case, (3 Ohio St. 195), provided the fault of Stallmann (if any) had been committed while engaged "in the ordinary exercise of his own rights." Indeed, it may well be doubted whether the judge intended the above language in the charge to be taken according to our understanding of its natural and ordinary import, from the further fact that in several instances, in qualifications subsequently made to instructions prayed for by defendant, the court stated that the defendant was required to use only "ordinary care." Nevertheless, we think the error in the charge was not thus cured, especially as the seventh exception to the charge, which was directly made to the objectionable part above stated, in the hearing of the jury, was permitted by the court to be entered without any qualification or remark whatever.

We also find, in other parts of the regular charge, as given to the jury, other instructions tending so strongly to impress upon the jury the belief that the law requires of street-railroad companies the exercise of the highest degree of care in the discharge of their duties toward the general public, that it is not at all probable that their minds were disabused upon the subject by any qualification or correction that was subsequently made. For instance, in the early part of the charge, the court said: "It is the duty of every railroad company, which traverses our streets to provide careful, competent and skilful drivers, and those thus employed *are bound to use all their skill and all proper prudence and care in the management of the horses committed to their charge.* They have but one track, upon which the cars are to be drawn. They are aware that they are upon a public thoroughfare, upon

which every inhabitant of the city and every person has a right to pass and repass *without molestation*, taking care that they do not obstruct the passage of the railway car, and yet claiming for themselves, as they have a right to do, the same benefits that the proprietors of the railway cars claim, consistent with their several occupations. The city unquestionably has the right to permit these street railroads to be established upon the public highway, *but that right is subordinate to the more extended right of all to travel upon the same highway*. In all these matters there must be mutual accommodation. One must not prevent the free passage of the other. There must be accommodation between them." To say the least, this is strong language by which to define ordinary care, or that degree of care which is usually exercised by persons of average skill and prudence, under the same or similar circumstances.

Again, for the purpose of illustrating to the jury the rule, that in actions for negligence it is immaterial whether the injury was the direct or indirect result of the alleged negligence, the court read an extract from the opinion in *Stokes v. Saltonstall*, 13 Pet. 181, 191, 7 Am. Neg. Cas. 297, as follows:

"In an action against the owner of a stage coach, used for carrying passengers, for an injury sustained by one of the passengers by the upsetting of the coach, the owner is not liable unless the injury, of which the plaintiff complains, was occasioned by the negligence or want of proper skill or care in the driver of the carriage, in which he and his wife were passengers; *and the facts that the carriage was upset and the plaintiff's wife injured, are prima facie evidence that there was carelessness, or negligence, or want of skill, on the part of the driver, and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.*

"It being admitted that the carriage was upset, and the plaintiff's wife injured, it is incumbent on the defendant to prove that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he was engaged; *and that he acted on this occasion with reasonable skill, and with the utmost prudence and caution, and if the disaster in question was occasioned by the least negligence or want of skill or prudence on his part, then the defendant is liable in the action.*

"If the want of *proper* skill or care of the driver placed the

*passengers* in a state of peril, and they had, at that time, a reasonable ground for supposing that the stage would upset, *or that the driver was incapable of managing his horses*, the plaintiff is entitled to recover; although the jury may believe, *from the position in which the stage was placed by the negligence of the driver*, the attempt of the plaintiff or his wife to escape may have increased the peril, or even caused the stage to upset, and although they may *also* find that the plaintiff and his wife would probably have sustained little or no injury if they had remained in the stage."

Now, the third paragraph of this extract is undoubtedly a fair statement of the rule, in an action by a passenger against a common carrier for hire, and it might not mislead, as an illustration of the principle, if given in a case wherein the want of ordinary care is the ground of liability. But it is difficult to see how the principle was at all illustrated by the first two paragraphs in the extract. By the first, the jury were clearly informed as to the *amount* of proof which would make a *prima facie* case of negligence, in an action against a common carrier of passengers for hire, for an injury to a passenger; and by the second paragraph, the jury were given to understand, that upon such a *prima facie* case being made, the burden was on the defendant to prove that he had acted not only with reasonable skill, but with the "utmost prudence and caution," and if the disaster was occasioned by "the least negligence or want of skill or prudence," he would be liable.

Now it is true again, that after the regular charge was concluded and the defendant had excepted to so much of the charge as had been quoted from *Stokes v. Saltonstall*, 13 Pet. 181, 191, 7 Am. Neg. Cas. 297, the court "instructed the jury that the language of said case was quoted not to determine the degree of care required, but to show that it was immaterial whether the negligence of the driver (of the car) was the direct or indirect cause of the injury." And it is claimed that this last instruction was sufficient to guard the jury against any improper application of the rules as laid down in *Stokes v. Saltonstall*, 13 Pet. 181, 191, 7 Am. Neg. Cas. 297.

We think otherwise, not solely because the first two paragraphs ought not to have been read to the jury, for the reason that the law announced therein was wholly inapplicable to the case at bar, but because the jury were not told in any part of the charge that

the law requires a higher degree of care to be exercised by common carriers for hire, toward passengers, than toward strangers, or that the amount or burden of proof required in one case was different from that required in the other. True, they were told that "ordinary care" only was required of the defendant in the case on trial, while the rule in *Stokes v. Saltonstall* was stated to be "the utmost care and caution;" yet, as the difference was not explained, it is more than possible that the jury would conclude, that in cases where human life was involved, "the utmost care and caution" would amount to "ordinary care and caution" only. Such, however, is not the law, as we understand it, for the double reason, that a stranger is not to the same degree within the power of the defendant to injure, nor has he paid a price for the exercise of diligence toward him.

But it must not be understood, for these reasons, that the law's regard for human life does not, under all circumstances, add greatly to the diligence that would otherwise be required.

Without considering other objections made to the charge as given and refused, suffice it to say, we are unanimously of the opinion that the probable, if not the necessary, effect of the charge, taken as a whole, was misleading and prejudicial to the plaintiff in error, and that the judgments of the Superior Court, both at General and Special Terms, must be reversed.

It is claimed, however, by defendant in error, that this cause, if reversed, should not be remanded for further trial, as it has been tried three times already, the trial in each instance resulting in a verdict for the defendant in error — the first time for \$3,000, and the second time for \$5,000. That the first verdict was set aside for the misconduct of a juror, but the second verdict having, as is claimed, been set aside without good cause, this court should now, upon review of the whole record, reverse the judgment by which the second verdict was set aside, and render judgment thereon, or remand for the purpose of having judgment rendered on the second verdict in the court below.

As a general rule, where a new trial is granted on a motion to set aside a verdict and grant a new trial, and a new trial and judgment are afterward had in the case, a reviewing court, on a proceeding in error to reverse the last judgment, will not review the action of the court in granting the new trial, in case of reversal of the last judgment; and we see nothing in this case to take it out of the general rule.

New trial granted, and cause remanded for further proceedings.

## COVINGTON TRANSFER COMPANY v. KELLY.

*Supreme Court, Ohio, January Term, 1880.*

[Reported in 36 Ohio St. 86.]

PASSENGER ON STREET CAR INJURED IN COLLISION BETWEEN STREET CAR AND WAGON — NEGLIGENCE OF CARRIER NOT IMPUTABLE TO PASSENGER. — In an action by a railroad passenger (who was, in fact, without fault himself), for a personal injury, against a defendant whose negligence directly and proximately concurred with the negligence of the railroad company in producing the injury, the concurrent negligence of the company cannot be imputed to the plaintiff so as to charge him with contributing to his own injury (1).  
(Syllabus by the Court.)

ERROR to the Superior Court of Cincinnati. *Judgment for plaintiff affirmed.*

Upon the trial of the case to a jury, issue having been joined by the defendants severally, and after the plaintiff had introduced all his testimony, the action was dismissed as to the railroad company on its motion, the court being of opinion that the testimony did not tend to prove a cause of action against it; thereupon further testimony was offered upon the issue between the plaintiff and the transfer company, and the following bill of exceptions was taken by the defendant, now plaintiff in error.

“ Be it remembered, that at the trial of this cause at the May term, A. D. 1876, of the Superior Court of the city of Cincinnati, it appeared from the testimony that the plaintiff, at the time of the happening of the injury complained of, was a passenger on a car owned and operated by the Cincinnati Consolidated Street Railroad Company, and there was evidence tending to show that the injury to the plaintiff was caused solely by the negligence of the Covington Transfer Company; and the defendant, the Covington Transfer Company, having offered evidence tending to prove that the injury to the plaintiff was caused solely by the negligence of the Cincinnati Consolidated Street Railroad Company, and also evidence tending to prove that the injury was caused by the joint negligence of the Covington Transfer Company and of the Cincinnati Consolidated Street Railroad Company, asked the court to charge the jury, that if they found from the testimony that the injury to the plaintiff was caused by the

1. See NOTE ON IMPUTED NEGLIGENCE, in 11 AM. NEG. CAS. 151-156.

joint negligence of the Covington Transfer Company and of the Cincinnati Consolidated Street Railroad Company, then the Cincinnati Consolidated Street Railroad Company alone would be liable to the plaintiff for the damages caused by such injury, and their verdict must be in favor of the Covington Transfer Company, which charge the court refused to give, and charged the jury that if they found from the testimony that the injury to the plaintiff was caused by the joint negligence of the Covington Transfer Company and of the Cincinnati Consolidated Street Railroad Company, then both the Covington Transfer Company and the Cincinnati Consolidated Street Railroad Company would be liable to the plaintiff for the damages resulting from said injury, and that the jury could render a verdict against the said The Covington Transfer Company, although the Cincinnati Consolidated Street Railroad Company has been dismissed from the action. To which refusal to give said charge, and to charge as given, the defendant, The Covington Transfer Company, by its counsel, then and there excepted, and presented this, its bill of exceptions, in that behalf, and prayed the court that the same might be signed, sealed, allowed and ordered to be made a part of the record in this cause; which was done accordingly at this term of the trial, to wit: the May term, A. D. 1876."

"Verdict and judgment having been rendered in favor of plaintiff below against the transfer company, the latter prosecutes this proceeding to reverse the same on the ground of misdirection to the jury, as set forth in the bill of exceptions.

"The original action was brought by Kelly against the Covington Transfer Company and The Cincinnati Consolidated Street Railroad Company, to recover damages for a personal injury. The cause of action was thus stated:

"Plaintiff states that before and at the time of the committing of the wrongs and injuries hereinafter complained of, the defendant, The Covington Transfer Company, a corporation duly created under the laws of Kentucky, and having a managing agent and place of business in the city of Cincinnati, Hamilton county, Ohio, was the owner of the certain wagon and horses hereinafter referred to, and the said defendant, The Cincinnati Consolidated Street Railroad Company, a corporation duly created under the laws of Ohio, was the owner of the street-railroad car hereinafter also referred to, and which was used by it to convey passengers in said city, for certain hire and reward.

"Plaintiff says, that on the 8th day of August, 1874, he became and was a passenger in the said car of said street-railroad company, to be safely carried therein over its road, for certain hire and reward, and he was then received in said car, as said passenger, by the said street-railroad company, and for which he paid to it the customary and required fare.

"That on said 8th day of August, 1874, while being thus seated and conveyed in said car, which was running along Third street, eastwardly, between Smith and Park streets, in said city of Cincinnati, the said defendant, The Covington Transfer Company, by its servants and agents, carelessly, negligently and unskillfully drove the said wagon belonging to it violently into the said street-railroad car, and in the direction where the plaintiff sat therein as aforesaid, and the said defendant, The Cincinnati Consolidated Street Railroad Company, then and there, in disregard of its duty, did, by its servants and agents, carelessly, negligently and unskillfully conduct the running of said street-railroad car, so that by the carelessness, negligence, unskillfulness and default of said defendants, The Covington Transfer Company and the Cincinnati Consolidated Street Railroad Company, through its servants and agents as aforesaid, and without any fault, neglect or carelessness whatever on his part, the right hand of the plaintiff was very badly cut and bruised and the bones thereof fractured and broken, causing him very great pain and suffering, rendering him totally unfit to attend to his necessary business for a long period, involving him in great expense in endeavoring to cure the said injuries, having been under constant treatment in a hospital, and yet, notwithstanding, his said hand has continued to be hitherto so badly bruised and fractured that particles of broken bones are frequently taken therefrom, and the hand is now entirely useless, and so crushed, its bones so fractured and ligaments thereof so lacerated, as to be, and the same is, rendered permanently injured and crippled, and so will remain during his life, and whereby, on account of the premises, he has sustained damages in the sum of \$2,000."

DODDS & WILSON, for plaintiff in error.

LONG, KRAMER & KRAMER, for defendant in error.

**McIlvaine, Ch. J.** — The exact questions presented by this record, as we understand the bill of exceptions, arises upon the fact assumed in the request to charge and in the charge as given to the jury, that the wrongful acts of the defendants below, the



railroad company and the transfer company, were not only concurrent, in point of time and place, but in such manner that the wrongful act of each was a direct and proximate cause of the injury complained of by the plaintiff; and this being so, it matters not whether the act of each, without the concurrence of the other, would have produced the injury, or, that the negligence of neither would have caused it without such concurrence; so that upon general principles and reason both or either ought to make compensation therefor. The general rule undoubtedly is, that where damage is caused by the joint or concurrent wrongful acts of two or more persons, they may be prosecuted therefor jointly or severally. To this general rule of liability, whether joint or several, there is an exception, however, based upon reasons as sound as is the rule itself, namely: that where the injured party, by his own negligence or wrongful act, contributed to his own injury, the law will not afford him a remedy against all or any of the persons whose wrongful acts, in connection with his own, produced the injury. But the case before us does not come within the exception above stated, for the reason that it is here admitted by the pleadings, that the plaintiff below was *in fact* without fault on his part. It is contended, however, by the plaintiff in error, that the plaintiff below was so identified with or related to the railroad company by the contract for carriage, that the fault of the carrier must be imputed to him as passenger.

The imputation thus contended for, however, is not based upon any alleged fault of the plaintiff below in entering into the contract for carriage with the railroad company; for there is not even a suggestion that the contract was one which a reasonably prudent man would not have made; but simply upon the ground that the plaintiff below was a passenger upon the car of the company at the time when an act of carelessness, contributing to his injury, was committed by one of the company's servants, namely: the driver of the car.

If the driver could, in any just sense, be regarded as the agent or servant of the passenger, or if the railroad company, whose servant the driver was, had been, under the contract, subject to the direction or control of the passenger, then, with some show of reason, it might be said that the passenger was responsible for the negligence of the driver.

But such was not the nature of the contract. The passenger

was, it is true, entitled to a seat in the company's car; but was not entitled to direct or control the time or manner of its movement. That the company was bound to exercise the highest degree of care to the end that the passenger might be safely carried, is true; but it was not subject to the direction or control of the passenger, either as to employment of servants or as to the manner in which the service should be performed. It seems to us, therefore, that the negligence of the company or of its servants should not be imputed to the passenger, where such negligence contributes to his injury jointly with the negligence of a third party, any more than it should be so imputed, where the negligence of the company or its servants was the sole cause of the injury. Indeed, it seems as incredible to my mind that the right of a passenger to redress against a stranger for an injury, caused directly and proximately by the latter's negligence, should be denied, on the ground that the negligence of his carrier contributed to his injury, he being without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier, whereby an injury was inflicted upon a stranger. And of the last proposition, it is enough to say that it is simply absurd.

While we acknowledge the high authority of cases holding views contrary to those above expressed (*Thorogood v. Bryan*, 8 C. B. 115 (1); *Armstrong v. Lancashire Railway Co.*, L. R., 10 Exch. 47 (2), and *Lockhardt v. Lichtenthaler*, 46 Pa. St. 151), we find,

1. In *Thorogood v. Bryan*, 8 C. B. 115, it was held that a passenger in a public conveyance, injured by the negligent management of another conveyance, cannot maintain an action against the owner of the latter, if the driver of the former, by the exercise of proper care and skill, might have avoided the accident which caused the injury.

But the doctrine of *Thorogood v. Bryan*, 8 C. B. 115, has been repudiated by the English courts. See note on the doctrine in 11 AM. NEG. CAS. 145-146.

2. In *Armstrong v. Lancashire & Yorkshire Railway Co.*, L. R. 10 Exch. 47, the facts were: A traveling in-

spector of the carriage department of the London and North Western Railway company was traveling with a free pass of that company in a train of theirs upon a journey on the railway of the Lancashire and Yorkshire Railway company, over which the London and North Western company had running powers, and while so traveling the train in which he was came into collision with a number of coal trucks of the Lancashire and Yorkshire Railway company, which were being shunted on their line by their servants, and the inspector received bodily injuries. Either in consequence of the hazy state of the weather or the slippery state of the rails, the driver of the train was unable to stop the train when he

on the other hand, many cases of equally high standing holding, and, we think, with better reason, that the negligence of the carrying company cannot be imputed to a passenger who is rightfully on its train, and who is guilty personally of no fault or negligence, in an action by such passenger against another party, whose negligence has contributed directly to his injury. *Chapman v. New Haven R. R. Co.*, 19 N. Y. 341; *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. 492; *Bennett v. N. J. R. R. Co.*, 36 N. J. L. 225; 1 *Smith Lead. Cas.* 450, 6th Am. Ed.; 43 *Wis.* 513; 14 *Minn.* 81; 11 *Allen*, 500; 50 *N. H.* 420.

We are also aware that by an almost unbroken line of decisions it is held that the negligence of a common carrier of goods, contributing to the injury of such goods while in its possession, is a good defense to an action by the owner of the goods against a third person whose negligence also contributed to the injury.

Whether these decisions conflict with the doctrine announced in this case depends entirely on the questions whether or not a distinction, on principle, can be made between cases of carriers of goods and carriers of passengers. That there is a marked distinction between the relations of the parties to these different contracts is quite certain. The common carrier of goods has actual possession of an absolute control over them, and is an insurer against loss or damage, except when occasioned by the act of God or a public enemy; while the carrier of passengers is only bound to the exercise of care; so that, in case of injury to a passenger over whose conduct the carrier has no physical control, his own misconduct bars his remedy, whether the injury was caused by the concurring negligence of the carrier or the joint negligence of the carrier and others; but in the case of goods, where the thing carried is incapable of contributory negligence, the law requires its safety to be insured. Now it may be that public policy, in the interest of trade and commerce, will not

came in sight of the distance signal, which had been put at "danger" by the servants of the Lancashire and Yorkshire Railway company, or he disregarded it. The jury, in an action by the plaintiff against the Lancashire and Yorkshire Railway company, found that the accident was due to the joint negligence of them in shunting the trucks when a passenger train was due, and of the London and North

Western Railway company in their driver running past the danger signal. Held, that the contributory negligence of the driver of the London and North Western Railway company's train, with whom the plaintiff, for the purpose of the action, is identified, disentitled him to maintain an action for damages against the Lancashire and Yorkshire Railway company for their negligence.

permit the liability of the carrier, who has failed in his duty in relation to goods, to be shifted to another, either with or without the consent of the owner; and, therefore, it may be that the law, in such case, requires the owner to seek redress from the carrier alone. But, however this may be, we are unanimous in the opinion that for a personal injury to a passenger, who is himself without fault, occasioned by the joint and concurring negligence of the carrier and another person, there is no sound principle of law which precludes the injured party from seeking redress from both or either of the wrongdoers.

Judgment affirmed.

## CLEVELAND, COLUMBUS AND CINCINNATI RAILROAD COMPANY v. TERRY.

*Supreme Court, Ohio, December Term, 1858.*

[Reported in 8 Ohio St. 570.]

### PERSON CROSSING TRACK STRUCK BY TRAIN — DEAF PERSON — EVIDENCE — INSTRUCTIONS. — 1. In an action against a railroad com-

- pany to recover damages caused to third persons by the train while in motion, no recovery can be had unless the employees were, at the time, guilty of negligence or want of due care; nor if the party injured was also guilty of negligence, contributing directly to the injury.
2. The degree of care required in such cases of the employees, and also of the party injured, is merely ordinary care and prudence, the perils to be encountered, and *all other circumstances* under which the injury was inflicted and received, being considered.
  3. Where the party injured is an adult of ordinary mental capacity, but partially deaf, her infirmity not being known to the servants of the company, will not increase their responsibilities as to care; nor will it excuse her from the full measure of care which prudent persons, partially deaf, but conscious of their infirmity, would ordinarily observe under similar circumstances.
  4. Such deafness, though unknown to the servants of the company, is a circumstance so connected with the infliction and receipt of the injury, that it could not, in the progress of the trial, be rightfully excluded from the jury; but the court should see that such circumstance is not improperly used by the party giving it in evidence.
  5. Where a *series* of instructions are asked, they are to be construed together; and where it is apparent, from the whole series and the responses of the court thereto, that general terms employed in some of the instructions asked were used and understood in a *limited or restricted* sense, they will, on error, be so regarded.

6. Where evidence of such deafness and evidence that the party injured, at the time of crossing the track, was prevented from observing the proximity of the train, by reason of a veil drawn and retained over her face, has been submitted to the jury, it is the right of the defendant to require the court to charge the jury, that neither such deafness nor voluntary obscuration of vision, will excuse the party injured from the observance of such ordinary care, "by the more cautious exercise of her remaining faculties;" and the court, on being requested so to charge, cannot, without comment, refer the whole matter to the jury.
7. The right of the court, under the code, to direct the jury to find a special verdict, is purely *discretionary*, and their refusal to do so cannot be assigned as error.

(Syllabus to Official Report.)

IN ERROR to the District Court of Delaware County. Judgment for plaintiff reversed.

"The Cleveland, Columbus and Cincinnati railroad track intersects a public highway in the village of Ashley, in the county of Delaware.

"On the 28th day of December, 1854, the express train, on the railroad track, going north, was approaching this point of intersection, at the same time as the wife of Jacob Terry, going east along the highway, was approaching the same point of intersection; and before she got across the railroad track, she was struck by the engine of the advancing train and badly hurt.

"Terry brought an action against the company to recover damages for the loss of his wife's services, and for the expense he had been, and would be subjected to, in doctoring and taking care of her, consequent upon being struck as stated; and alleges that she was struck and injured without her fault, and through the carelessness of the agents of the company who were in charge of the engine and train. The answer of the company denies the negligence imputed to its agents, and insists that the injury to Mrs. Terry was the result of her own want of care, etc. In June, 1857, the case was tried in the District Court; and resulting in a verdict for Terry, the company moved for a new trial, which was overruled and judgment entered on the verdict. To reverse this judgment the present petition in error is prosecuted.

"It appears, from the bill of exceptions, that on the trial before the jury in the District Court, the plaintiff, to maintain the issue on his part, offered evidence tending to show that, at the time of the accident, his wife was partially deaf, whereby she was prevented from hearing the approach of the train by which the injury in question was produced, as readily as persons in general

could, in like circumstances, hear the same. To the introduction of which testimony the defendant objected, unless the plaintiff proposed to show, also, that a knowledge of such deafness was, at the time, brought home to the defendant; which objection the court overruled and admitted the testimony. The plaintiff introduced testimony tending to show, also, that at the time of such injury, it being in the month of December and a drizzling rain, with wind, falling at the time, his wife was covered with a hood, and had over her face a veil, which was doubled, whereby she was prevented from seeing with distinctness. And the defendant introduced testimony tending to show, among other things, that the plaintiff's wife was in fact aware of the approach of train, before she stepped onto the track at the time of the injury, and that she was induced to step onto said track, because she was deceived by said hood and veil as to the distance the train was off, at the time.

"And, thereupon, the evidence being closed, the defendant, among other things, asked the court to charge the jury:

"5. That if they should find that the wife of the plaintiff was in fact deaf in any degree, this circumstance could not enhance the responsibilities of the defendant, as to the care it should exercise, unless a knowledge of the fact was brought home to it; but on the other hand, that circumstance would throw upon her the necessity of a more cautious exercise of the faculties she was possessed of.

"6. That if the wife of the plaintiff had so muffled up her face as to prevent her from seeing with accuracy, at the time she was crossing the track of the defendant, that fact would throw no additional responsibilities, as to care, upon the defendant, but would increase her own."

"And the court having, in answer to other instructions asked, charged the jury that the defendant was not liable in this action, unless they should find from the testimony, first, that the defendant was guilty of negligence, and second, that that negligence was the sole cause of the injury, further charged the jury, that if Mrs. Terry was guilty of any carelessness at the time, which contributed, in any material degree, to the injury, the plaintiff could not recover. That if she omitted to do anything at the time which she might have done, in the exercise of reasonable and ordinary care, under the circumstances, which would have prevented the injury, then the plaintiff could not recover. That if

the jury should be satisfied from the testimony, that (when) the wife of the plaintiff stepped upon the track of the defendant, at the time of the injury complained of, she was aware of the approach of the train by which the injury was produced; and if they should find that that train was within such a distance as to render it dangerous for her to cross, and that, by the reasonable exercise of her faculties, and by ordinary care at the time, she could have been made aware of the danger, her passing upon the track, under such circumstances, was such an act of carelessness in the premises as would prevent the plaintiff from recovering for the injury thus sustained, unless the injury was wantonly inflicted by the defendant.

"In reply to the fifth instruction asked, the court charged to the jury, 'that if they should find that the wife of the plaintiff was in fact deaf in any degree, this circumstance could not enhance the responsibilities of the defendant as to the care it should exercise, unless a knowledge of the fact was brought home to it;' but the court refused to charge the jury, 'that the circumstance of her deafness would throw upon her the necessity of a more cautious exercise of the faculties she was possessed of,' and left that matter to the jury as a question of fact, under all the circumstances of the case, and the charges aforesaid before given.

"And in reply to the sixth instruction asked, the court charged the jury, 'that if the wife of the plaintiff had so muffled up her face as to prevent her from seeing with accuracy at the time she was crossing the track of the defendant, that fact would throw no additional responsibilities as to care upon the defendant;' but the court refused to charge the jury, 'that the fact that she was so muffled up would increase her own responsibilities as to care,' and left that matter as a question of fact for the jury, under all the circumstances of the case, and the charges before given.

"The defendant also requested the court to instruct the jury to find specially, in their verdict, whether the carelessness of the wife of the plaintiff, at the time of the injury, contributed, in any material degree, to the production of that injury, and whether her conduct, under the circumstances, was such as was consistent with reasonable care and prudence. But the court declined so to instruct the jury.

"The defendant excepted to the admission of evidence of the deafness of Mrs. Terry and to said refusals of the court to charge the jury as requested, and to the charge given in lieu thereof.

"The plaintiff in error insists that the District Court erred:

"1. In admitting the evidence tending to prove the partial deafness of Mrs. Terry, without requiring Terry to show that the agents of the company, in charge of the train, knew of such deafness.

"2. In refusing to charge the jury that such deafness, if it existed, would throw upon her the necessity of a more cautious exercise of the faculties she was possessed of; and in leaving that matter to the jury as a question of fact.

"3. In refusing to charge the jury that, if Mrs. Terry had so muffled up her face as to prevent her from seeing with accuracy at the time she was crossing the railroad track, that fact would increase her own responsibilities as to care; and in leaving that matter to the jury as a question of fact.

"4. In refusing to instruct the jury to find a special verdict as requested."

CRITCHFIELD and JONES & CARPER and F. T. BACKUS, for plaintiff in error.

REID & EATON and POWELL & VAN DEMAN, for defendant in error.

**Peck, J.** — The first question which arises upon the record is, whether, under the issues joined between the parties, the court below erred in admitting testimony of the partial deafness of Mrs. Terry, the plaintiff not proposing to show that the defendant knew of her deafness at the time the injury was inflicted. It is clear, we think, that without such knowledge on the part of defendant, the unfortunate condition of Mrs. Terry would not impose upon the defendant or its agents, any increased degree of care; and such seems to have been the matured opinion of the court below; for in its charge to the jury, the court expressly say, that such deafness could not enhance the responsibilities of the defendant, unless a knowledge of the fact should be brought home to it. The answer of the company denies the negligence imputed to its agents, and insists that the injury to Mrs. Terry was the result of her own want of care, etc. And it is quite probable that when the testimony was offered, it may have been supposed that, without such knowledge, Mrs. Terry's condition reflected upon the degree of care to be exercised by the defendant below or its agents; but if the evidence was competent and admissible on any other ground, though not for that purpose, the failure of the plaintiff to disclose the true ground would not have authorized its rejection.



The issues before the jury involved the question of the exercise of ordinary care and prudence, on the part of Mrs. Terry, and also of the railroad officers. The solution of these questions depends upon the peculiar facts and circumstances of *each* case, the state and condition of the parties, the manner in which, and the circumstances under which, the injury was received or inflicted; in short, all the circumstances surrounding the transaction, which in any way reflect upon either the *degree of care* or the *manner* in which, in the particular case, it should have been exercised. The circumstances are all relevant, and may be given to the jury. The effect which they should have upon the jury, is another and very different question. They form, so to speak, a part of the *res gestæ* of the transaction; they are the circumstances under which it occurred, and indicate the agencies which caused it, and should not, therefore, be excluded; but the court trying the cause, should, so far as practicable, see that undue weight is not attached to them by the jury.

There was not, then, in our judgment, any error in the admission of the testimony in regard to the deafness of Mrs. Terry.

Did the court below err in refusing to give the instruction asked by the plaintiff in error, as to the effect of Mrs. Terry's deafness—"that that circumstance (if proved) would throw upon her the necessity of a more cautious exercise of the faculties she was possessed of;" or in refusing to instruct them "that if the wife of the plaintiff (below) had so muffled up her face as to prevent her from seeing with accuracy, at the time she was crossing the track of the defendant, her responsibilities would be thereby increased?"

Both parties—the railroad company and Mrs. Terry—were bound—the one in running their cars, and the other in crossing the track—to the observance of ordinary care and prudence, in order to prevent an injury to either. If the party sued acted with ordinary care and prudence, or if both parties were guilty of negligence—that is, a want of ordinary care and prudence—contributing directly to the injury, no recovery can be had. In the first case, the defendant has fulfilled all the obligations which the law imposed upon it; and in the last, both parties are in fault, and the damages could not be apportioned.

The jury, in this case, by their verdict, found the defendant below guilty of culpable negligence in the conduct and management of their train, and this would entitle the plaintiff below to

a verdict and judgment, unless Mrs. Terry was also guilty of culpable negligence, contributing to the injury.

What, then, is meant by ordinary care and prudence, the observance of which exonerates a party, in case of accident, and the absence of which, in this class of cases, is termed negligence, and renders a party liable?

Ordinary care is not defined in the charge copied in the bill of exceptions, but it is well known to mean that degree of care which persons of ordinary care and prudence are accustomed to use and employ, under the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination, having due regard to the rights of others and the objects to be accomplished.

It is obvious from this definition, that the ordinary care required by the rule, has not only an *absolute*, but also a *relative* signification. It is to be such care as prudent persons are accustomed to exercise, under the peculiar circumstances of each case. If called into exercise under circumstances of peculiar peril, a greater amount of care is required than where the circumstances are less perilous; because prudent and careful persons, having in view the object to be attained, and the just rights of others, are, in such cases, accustomed to exercise more care than in cases less perilous. The *amount* of care is indeed increased, but the *standard* is still the same. It is still nothing more than ordinary care *under the circumstances* of that particular case. These circumstances, then, are to be regarded in determining whether ordinary care has been exercised.

And in the case at bar, in determining whether Mrs. Terry, in the cases referred to in the fifth and sixth instructions asked, did conduct herself with ordinary care and prudence, in attempting to cross the railroad track at the time of the accident, the question to be solved by the court and jury may be stated thus: Would a person of ordinary prudence and capacity, partially deaf, but conscious of that infirmity, and with her head so muffled as to prevent her seeing with accuracy, attempt to cross the track at the time, and under the circumstances, when she made the attempt? Her partial deafness, and the fact, if true, that her head was so muffled with a veil, as to prevent her seeing with distinctness, are as much part of the *circumstance* under which the attempt was made, as the time when it was attempted, and the fact that the up train was then momentarily expected. They

formed a portion of the circumstances, which are to graduate the effort and determine whether ordinary care was exercised by her.

Much unnecessary embarrassment and complication is thrown about the question of the relative duties and responsibilities of the parties receiving and inflicting the injuries, by losing sight of this distinction between the *amount*, and the *degree* or *kind* of care to be exercised in each particular case.

Such being the rule, as to the duties and responsibilities of the party injured by an accident, where the other party is in fault, did the court err in refusing to charge the jury, that, under the fifth instruction asked, Mrs. Terry's partial deafness "would throw upon her the necessity of a more cautious exercise of the faculties she was possessed of;" or, under the sixth instruction asked, "that if Mrs. Terry's face was so muffled up as to prevent her seeing with accuracy, at the time she was crossing the track, that fact would increase her responsibilities?"

The circumstances alluded to in these instructions, were in evidence before the jury, and were claimed as proved by the plaintiff; and, as we have already seen, were circumstances proper for the consideration of the jury, in determining whether due care had been observed by Mrs. Terry.

The instructions, it is true, especially the sixth, claim that, by reason of the facts stated, Mrs. Terry's responsibilities were *increased*; but it is obvious from the whole series of instructions asked, especially the fourth and sixth, and the responses of the court, and at the same time giving to the bill of exceptions a reasonable and not hypercritical construction, that it was not claimed by the defendant below, nor understood by the court as claimed by defendant, that anything more than *ordinary care*, in its legal sense, was in any event required of Mrs. Terry.

The fifth instruction does not, perhaps, even *in terms*, assert any *increase* of responsibility; it being, merely, that a partial paralysis of one sense, requires a more cautious exercise of those which remain, in order to avoid injury; and, therefore, in no sense enlarges the obligation of Mrs. Terry to the exercise of anything more than ordinary care. It is to be borne in mind that the court below, while they had laid down the rule, that reasonable care to avoid the injury, was required of Mrs. Terry, did not, in any portion of the charge set forth in the bill of exceptions, define what would be reasonable care, nor allude to the fact, that it is relative in its character, and dependent on the particular

circumstances. The evidence of partial deafness, and the obscuration of vision through the agency of the double veil, were before the jury, neither of which, under the charge of the court, increased the responsibilities of the plaintiff in error; and it was, therefore, of much importance for the jury to know it could not, in law, limit or qualify the obligation of Mrs. Terry to exercise ordinary care and prudence to avoid injury, as hereinbefore explained.

It is claimed, however, that the court might rightfully refuse to give the charges asked, because they had too wide a scope, no limit being affixed to the extent of the requirement of "a more cautious exercise of her (remaining) faculties," in the fifth, and the "increase" of her responsibilities in the sixth; so that the charges asked, reached extraordinary as well as ordinary care, and, therefore, claimed too much.

We have already had occasion to remark, that the bill of exceptions is to receive a reasonable, and not a hypercritical construction; that the series of instructions asked should be taken together; and it is apparent from the fourth and seventh instructions asked and given, that the degree of care contemplated in the series, and understood by the court, was merely ordinary care under the circumstances. And the general terms employed in those instructions should be regarded as limited to the exercise by Mrs. Terry of ordinary care, in its legal sense.

Again, it is claimed that the question, of whether there was negligence on the part of Mrs. Terry, is a question of fact upon which the court cannot be required to exercise an opinion, and was, therefore, very properly left, without comment, to the jury.

Upon this question there is some diversity in the authorities. See them collected and commented on in *Pierce on Railways*, 283-4, and *Redfield on Railways*, 333 *et seq.*

The better rule is, probably, that stated in *Trow v. Vermont Central R. R. Co.*, 24 Vt. 497: "The question of negligence is a mixed question of law and fact, upon which, if asked, it is the duty of the court specifically to instruct the jury; and where the facts in the case are admitted, or where there is evidence tending to prove the facts, it is (ordinarily) the duty of the court, if requested, to instruct the jury whether the facts admitted or found to be true, constitute (such) negligence as will defeat the action."

It is not perhaps necessary to decide this somewhat vexed

question. The court had not defined what, in law, was meant by ordinary care; the facts alluded to were in evidence, and, as we have seen, reflected upon the extent of ordinary care in that case — they were a part of the circumstances under which the injury to Mrs. Terry was inflicted and received; and, in the absence of any instruction, that in determining the question of ordinary care, the jury were to look to all the circumstances surrounding the transaction, it is very clear, we think, that the defendant below might require of the court to instruct the jury as to the effect of those circumstances, if established, upon the question of ordinary care.

There is a class of cases to be found in the books, where persons of unsound mind, or of immature age, and who, from their infancy, or insanity, are incapable of properly estimating the danger and avoiding the injury, have been injured by the negligence of others, in which the courts have arrived at different and inconsistent results, some holding that no recovery can be had in such cases, if their conduct would have amounted to negligence in an adult or ordinary intelligence and capacity, while a recovery has been permitted in other tribunals, on the same or a similar state of facts. See cases cited in *Pierce on Railways*, 278 *et seq.* And it is sought to assimilate the disability of Mrs. Terry to those cases which allow a recovery, and claim a right to recover, because she was disabled from hearing the approach of the cars; and not, therefore, chargeable with negligence.

It is sufficient answer to say, that even if the cases which allow a recovery for negligence for injuries inflicted upon persons of unsound mind or tender years, irrespective of the negligent conduct of such persons, be sound law — and as to which we do not now express any opinion — they can have no just application to the case at bar, where the person injured was of mature age and presumed sanity and capacity. In the case of a person of unsound mind, or of tender years, the recovery is allowed because, not being possessed of capacity and intelligence to properly apprehend the peril and adopt measures to avoid it, negligence cannot justly be imputed to them; while Mrs. Terry was of mature age, and, for aught that appears in the bill of exceptions, in the full possession of all her mental faculties — competent to truly estimate the peril, and to determine the proper means of avoiding the danger. The reason, then, which authorized the exception in the one case, does not arise in the other.

The other error assigned, that the court declined to instruct the jury to find a special verdict, has not been argued, and I presume is not insisted upon by the counsel for plaintiff in error. It is sufficient to say that the right of the court to direct a special verdict is discretionary (§ 276 of Code of Civil Procedure), and the refusal to do so cannot be assigned as error.

Judgment reversed and cause remanded. BRINKERHOFF, SCOTT and SUTLIFF, JJ., concurred.

## CINCINNATI STREET RAILWAY COMPANY v. SNELL.

*Supreme Court, Ohio, January Term, 1896.*

[Reported in 54 Ohio St. 197.]

### STREET CROSSINGS — RIGHTS OF PEDESTRIANS — DUTY OF DRIVERS OF VEHICLES — PERSON CROSSING STREET STRUCK BY STREET CAR — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. —

1. The introduction of new forms of vehicles, and of new motive power on street railways, has not impaired the right of the foot passengers to safe passage at street crossings. It is the duty of drivers of vehicles, whether wagons, wheels, or cars, to so regulate the speed thereof, and give such warning of approach at whatever cost of pains and trouble on their part, as that the footman, using ordinary care himself may, in the absence of unavoidable accident, cross in safety.
2. When a street-railway company operating a double-track road discharges a passenger at a street crossing, having reason to know that such passenger, in order to reach his destination, must cross its tracks, it is the duty of such company to regard the rights of the passenger while on the crossing, and to so control the speed of cars on its tracks, and give such warning of their approach, as will reasonably protect the passenger from injury. Omission of such duty is negligence, and a person injured by reason thereof may maintain an action against the company for damages unless prevented by his own negligence contributing to the injury.
3. A person about to cross the track of a street railway at a street crossing is bound to exercise care proportioned to the danger to be avoided and the consequences which might result from want of it, conforming in amount and degree to the particular circumstances surrounding him; but it is only ordinary care which is required, that which might reasonably be expected of persons of ordinary prudence. Ordinary care does not require him to anticipate negligence on the part of those operating the railway. And while he should use his faculties for his own protection, it is not negligence *per se* for him to omit to look in both directions for the approach of a car. Whether it is or not negligence depends upon the circumstances.
4. Where the evidence of the plaintiff shows actionable negligence on the part of the company and the question of contributory negligence of the plaintiff depends upon a variety of circumstances from which different minds

may reasonably arrive at different conclusions as to whether there was contributory negligence or not, the question should be submitted to the jury under proper instructions; and it is error in such case for the court to direct a verdict for the defendant.

5. And where in such case the question as to whether or not the plaintiff exercised his faculties of seeing and hearing before attempting to cross is in issue, and the oral evidence tends to show that he did, while circumstantial evidence tends to disprove that claim, a condition is presented involving such variety of circumstances as makes it proper to submit the question to the jury.

(Syllabus by the Court.)

ERROR to the Circuit Court of Hamilton County. *Judgment of Circuit Court reversing judgment for defendant affirmed.*

"Action below was by Snell against The Cincinnati Street-Railway Company to recover for personal injuries received by being struck by a moving car of the company. In the Common Pleas, at the conclusion of the plaintiff's testimony, a motion by the company to direct a verdict in its favor was sustained, and a judgment on the verdict so rendered was entered. This judgment was reversed by the Circuit Court. The company asks a reversal of that judgment."

PAXTON, WARRINGTON & BOUTET and KITTREDGE & WILBY, for plaintiff in error.

JOHN W. WOLFE and THOMAS L. MICHIE, for defendant in error.

**Spear, J.**—The ground upon which the Common Pleas directed a verdict was that the plaintiff's evidence disclosed contributory negligence of such a character as to preclude a recovery. In other words, the holding was that, as matter of law, the plaintiff was guilty of contributory negligence. If the plaintiff's conduct, as shown by the undisputed facts, left no rational inference, but that of negligence, then the ruling was right; but if the question of contributory negligence depended upon a variety of circumstances, from which different minds might arrive at different conclusions as to whether there was negligence or not, then the ruling was wrong. This follows from the rule given in *Ellis & Morton v. Ins. & Trust Co.*, 4 Ohio St. 627. Applying the doctrine of that case, the motion involved an admission of all the facts which the evidence in any degree tended to prove, and presented only a question of law, whether such fact indispensable to the right of action, and put in issue by the pleadings, had been supported by some evidence. If it had been, no matter how

slight the evidence, the motion should have been denied, because it was the right of the plaintiff to have the weight and sufficiency of his evidence passed upon by the jury. But if he had failed to give evidence tending to establish any fact without which the law would not permit a recovery, he had nothing to submit to the jury, and a question of law only remained. We are aware that this rule is much criticised, and plausible arguments against its reasonableness have been adduced, but it has been followed uniformly, and should be applied until definitely overruled, or changed by legislation.

The plaintiff was himself bound to use ordinary care, such degree of care as a man of ordinary prudence commonly uses under like circumstances; care proportioned to the danger to be avoided, and the consequences which might result from want of it, conforming in amount and degree to the particular circumstances under which it was to be exercised. If all people exercised the greatest possible caution in approaching and crossing railroad tracks, accidents would be much less frequent than they are; but the law does not require extreme care. Such care, and such only, as ordinarily prudent persons could reasonably be expected to exercise under the circumstances is the full measure. In order, therefore, to judge whether or not a fair question was presented, regarding plaintiff's contributory negligence, we must inquire into the circumstances as disclosed by the evidence he introduced.

The evidence showed that the company's road is operated on Eastern avenue, Cincinnati, a thoroughfare running east and west. It is a double-track electric road, the space between the tracks being about three feet. The cars are wider than the track, extending about one foot outside the rail. Defendant in error, Snell, resided on the north side of the avenue, between Washington and Weeks streets, the block between these streets being about 800 feet in length. Near his residence, in front of a drug store, there was a flag-stone street cross-walk, at which the cars were accustomed to stop to receive and discharge passengers. Snell had been a daily passenger on the road for a number of years, and was known, as also his residence and place of getting on and off, to the railroad conductors. On the day of the accident, Snell was a passenger on an east bound car on the south track. As the car approached the crossing, the speed was slackened to allow Snell to get off, but did not quite stop. He



stepped off outside of the south track at the crossing, and turned north to go to the north side of the street, which required him to cross both tracks. As he neared the south rail of the north track, he was struck by a west-bound car and injured.

The evidence tended to show further that Snell had not observed the coming car before alighting, nor does it appear that he looked while in the car, in the direction from which the other car was approaching. At some time, while crossing, he looked both east and west along the track, but the precise point from which he looked east is not clear. The conductor of the car on which he had ridden gave him no warning of the approaching car, nor was any gong or other alarm sounded, or warning given, by the motorman in charge of the coming car. He was inexperienced, having been the driver of a milk wagon until two or three days before. On the same car there was an experienced motorman, who was on for the purpose of giving the new hand instructions. At the moment Snell was struck, the car was running about twenty miles an hour, on a down grade, and ran about 100 feet before it could be stopped. The car from which Snell alighted was moving slowly east, and, had the other car been running at an ordinary rate of speed, Snell would probably have had, after he saw it, opportunity to avoid it; but the car moved so rapidly that, after seeing it, he had but time to throw up his hands and try to step back, when the car struck him.

The question presented for the court was, simply, Did the evidence establish, as matter of law, that Snell was guilty of negligence contributing to his injury? The place of the accident was a street crossing, used as such by the public, and recognized as such by the company. It was the duty of the company to keep in mind the right of pedestrians on that crossing, and especially its duty to observe the rights of its own patrons, who were under a necessity of using that crossing in going from its cars to their houses. Ancient rights have not changed because new vehicles of travel have been introduced upon the streets, nor because a portion of the people who ride, being in haste to reach their destination, demand rapid transit. The streets remain for all the people, and he who goes afoot has the right, especially at a crossing, to walk to his destination; he should not be compelled to run, or to dodge and scramble, to avoid collision with vehicles. As a general proposition, drivers of vehicles have the same right to travel along the carriageway of a street that foot passengers have

to walk there. There is no priority of right, so that the right of neither is exclusive. But it is to be borne in mind that the injury by collision is wholly upon the side of the footman; and the right of personal protection which every person possesses, together with that moral and legal obligation to refrain from doing an injury to his person, which is imposed upon all others, gives the foot passenger such a right at street crossings, as to make it the duty of drivers of vehicles, whether wagons, wheels or cars, to so regulate their speed and give such warning of approach, at whatever cost of pains and trouble on their part, as that the footman, using ordinary care himself and barring inevitable accident, may cross in safety. Life and limb are of more consequence than quick transit. The vehicle man must not run down the pedestrian. The opposite doctrine appears to have found lodgment in many minds, and there seems a disposition to assume that a foot passenger has no right upon a public street as against a street car. Indeed, common observation seems to show that this belief controls the conduct of drivers of many conveyances, public and private. Too often there is a reckless disregard of human life and limb, and pedestrians are compelled, at their peril, to keep out of the way. As matter of law, it is as much the duty of the vehicle to keep out of the way of the footman, and especially so at crossings, as it is for the latter to escape being run over, giving due consideration to the greater difficulty of guiding and arresting the progress of the vehicle. The use of streets for railways is allowed only because it is considered not to be a substantial interference with their free and unobstructed use as highways for passage. So long, therefore, as there is no unreasonable interference with the public right of passage, railways in streets are lawful structures; but, if operated upon the theory of exclusive right to their track, they become wrongdoers. *Street R'y Co. v. Cumminsville*, 14 Ohio St. 523; *Coach Co. v. Railroad Co.*, 33 N. J. Eq. 267; *Baxter v. Railroad Co.*, 3 Rob. 516; *Barker v. Savage*, 1 Sweeny, 288; *Ry. Co. v. Block*, 55 N. J. L. 605; *Attorney-General v. Railroad Co.*, 125 Mass. 515.

Undoubtedly the footman must reasonably use his senses for his own protection, and if he knows of the approach of a vehicle, and, using his faculties, perceives that he cannot continue on without danger of collision, he may not rush forward regardless of consequences. He is not bound, however, to anticipate

negligence on the part of drivers of vehicles, but has the right to assume that they will not be negligent.

In this case, if the evidence was to be believed, there was a total disregard of plaintiff's rights, a clear case of gross, culpable negligence. The company owed to the passenger, who had just alighted, the duty of permitting him to cross from its car to the opposite side of the street, without peril of life or limb, from the acts of the company; instead of which it sent its car down the grade at break-neck speed, without giving any warning, or taking any pains to avoid running him down. Snell, it is true, was bound to anticipate that a car might come on the north track, but he was not required to anticipate that it would come at such a dangerous rate of speed, for that would be presuming that the company would be negligent; and if, acting on the presumption that the company would not be negligent, he used such caution as men of ordinary prudence would have used, his own conduct did not preclude a recovery. Whether he did use such degree of care, we think, was a question for the jury. The next evidence presented a case where different minds might reasonably reach different conclusions. We are not required to determine the question whether or not Snell was negligent.

It is insisted that, in the best view of the case for the plaintiff, the evidence shows that he did not look to the east; for while it may be that the verbal evidence tended to show that he did look that direction, yet he could not have done so, for if he had he surely would have seen the coming car, and that, as matter of law, it is negligence for one about to cross a railway not to look each way. Authorities are to be found giving apparent support to this proposition. The practice in some courts is for the court to direct a verdict whenever, in the opinion of the judge, the evidence would not warrant a judgment. And some of these decisions imply that the court has held a person about to cross a street-car track to the same degree of care as would be demanded were he crossing a steam railroad. We think there is no just analogy between the right of a street railway, running cars along a highway, and the right of a steam railroad, running its trains across a highway, at grade, and that the rule of care incumbent upon one about to cross a steam railroad is hardly a fair one to be applied in all its strictness to street railways in cities, where a car that can be speedily stopped passes a crossing at frequent intervals, and where people necessarily cross the streets frequently

and hurriedly. As remarked by Gray, Ch. J., in *Lynam v. Union R'y Co.*, 114 Mass. 83 (12 Am. Neg. Cas. 58, n.): "The cases relating to injuries suffered by being struck by a locomotive engine, at a railroad crossing, afford no test of the degree of care required of the plaintiff in this case. The cars of a horse railway have not the same right to the use of the track, over which they travel, do not run at the same speed, are not attended with the same danger, and are not so difficult to check quickly and suddenly, as those of an ordinary railroad corporation. A person lawfully traveling upon the highway is not, therefore, bound to exercise the same degree of watchfulness and attention to avoid the one as to keep himself out of the way of the other." Other cases in Massachusetts are to the effect that the fact that plaintiff's evidence does not show that he looked up and down the street before crossing is not, as matter of law, conclusive evidence that he was not in the exercise of due care, and that the mere fact of not looking when one attempts to cross a railroad is not conclusive evidence of want of care. *Williams v. Grealy*, 112 Mass. 82 (12 Am. Neg. Cas. 69, n.); *Bowser v. Wellington*, 126 Mass. 391 (1 Am. Neg. Cas. 69, n.); *Shapleigh v. Wyman*, 134 Mass. 118 (12 Am. Neg. Cas. 69, n.). Whether such omission is or is not negligence depends upon the circumstances. *R'y Co. v. Block*, 55 N. J. L. 605; *City Railroad Co. v. Robinson*, 4 L. R. A. 126; *Street R'y Co. v. Loehneisen*, 58 N. W. Rep. 535; *Shea v. Railroad Co.*, 44 Cal. 414; *Swain v. Railroad Co.*, 93 Cal. 179; *Driscoll v. Cable R'y Co.*, 97 Cal. 553; *Thomp. on Neg.*, 396, note. We suppose the rule for street cars is the same as for other vehicles, and if the footman is required, in a crowded thoroughfare, to look up and down and wait until all possibility of collision is past, it would be like sitting on the bank until the stream should run by, and there would be but few hours in the busy part of the day when it would be practicable to cross.

Whether looking eastward would have disclosed the coming car, depends upon whether the receding car would have obstructed the view, and this depends upon its location at the time Snell looked, if he did look. The evidence is consistent with the conclusion that he looked up the track, but that the receding car prevented him from seeing the approaching one, and that, as the former made some noise, his attention was not called to the rumbling of the latter. And it is not inconsistent with the

conclusion that ordinary range of vision would probably have enabled him, without turning his head or eyes up the track, to see a car in time to avoid it had the car been running at a safe rate of speed, and we think one so crossing could not be asked to extend his observation beyond that distance, within which a car proceeding at a customary and reasonably safe speed would threaten his safety.

Taking the effect of the evidence as a whole, one thing which is tolerably clear, is that if the car had been running at a reasonable rate of speed, and proper warning had been given, Snell would not have been injured; all else is in more or less doubt. The evidence *pro* and *con*, therefore, was to be weighed, and the tribunal for that purpose was the jury, not the court upon the motion.

The judgment of reversal was, we think right, and the same is affirmed.

**Shauck, J. (dissenting).** — The case upon which the trial judge gave a conclusive direction to the jury, taking the view most favorable to the plaintiff that the evidence would permit, was that his senses of sight and hearing were normal, that he knew he was upon a double-track electric railway, that he quit a car and immediately passed to its rear, toward the other track, without looking in the direction from which the colliding car came, and was struck and injured by a car approaching at a rate of speed which, under the circumstances, was dangerous, and that he had no knowledge of its approach. The negligence of the defendant is conceded, and the material inquiry relates to the conduct of the plaintiff. The degree or character of the defendant's negligence cannot be material, if, by due care, on the part of the plaintiff, the injury would have been avoided.

Upon this subject it is said in the principal opinion: "Undoubtedly the footman must reasonably use his senses for his own protection, and if he knows of the approach of a vehicle, and, using his faculties, perceives that he cannot continue on without danger of collision, he may not rush forward, regardless of consequences." If this means that under such circumstances, the footman is required to use his senses of sight and hearing to ascertain whether a car is approaching upon the track which he is about to cross, it is a correct statement of the law and a full justification of the direction given to the jury. If, however, it means that nothing is required of him, except to act rationally,

in view of dangers that may be threatened from a car of whose approach he may happen to know, it defines a rule, which in view of the difficulty in proving his knowledge, is incapable of practical application, and which is in conflict with the adjudicated cases and the established principles of negligence.

Some of those principles are accurately though generally stated in the foregoing syllabus and opinion. But the law, keeping pace with the progress of society, has, from those general principles, deduced definite rules of conduct, applicable to situations which arise frequently. Such a rule was defined by this court in *Cleveland, Col. & Cin. R'y Co. v. Crawford* (Sipes' Adm'r), 24 Ohio St. 631 (1), by which it is made the imperative duty of "a person in the full enjoyment of the faculties of seeing and hearing, before attempting to pass over a known railroad crossing, to use them for the purpose of discovering and avoiding danger from an approaching train; and the omission to do so, without a reasonable excuse therefor, is negligence which will defeat an action by such person for an injury to which such negligence contributed." That rule has been affirmed in very many cases, among which are *Cleveland, Col., Cin. & Ind. R'y Co. v. Elliott*, 28 Ohio St. 340 (2); *Penn. Co. v. Rathgeb*, 32 Ohio St. 66 (3); *B. & O. R. R. Co. v. Whitacre*, 35 Ohio St. 627 (4). In *Penn. Co. v. Rathgeb*, *supra*, the general rules were correctly given to the jury, but the judgment of the trial court was reversed by this court, because there was not given the definite and particular rule which the trial judge applied in this case.

Neither the authorities nor the reasons involved will permit a distinction between steam cars, on the one hand, and electric and cable cars, on the other, as to the application of this rule. *Bailey v. Cable R'y Co.* (Cal.), 42 Pac. Rep. 914; *Buzby v. Traction Co.*, 126 Pa. St. 559; *Ward v. Rochester Electric R'y*

1. See the Sipes (or Crawford) case, precautions looking to his safety before driving across track.

2. *CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS R'Y CO. v. ELLIOT*, 28 Ohio St. 340 (1876), collision between train and vehicle at crossing; first trial resulted in verdict for plaintiff for \$3,000, and on second trial there was verdict for \$4,925; judgment reversed for failure of plaintiff to use proper

3. *PENNSYLVANIA CO. v. RATHGEB*, 32 Ohio St. 66 (1877), collision of train with coal cart at crossing; judgment for plaintiff for \$1,900 reversed for failure to charge that it was duty of plaintiff to look for train before crossing track.

4. See note of the Whitacre case, on page 432, *ante*.

Co., 17 N. Y. Supp. 427; *Fritz v. Detroit St. R'y Co.*, 62 N. W. Rep. 1007; *Boerth v. West Side R'y Co.*, 87 Wis. 288. The distinction is not encouraged by the decisions of the Supreme Court of Massachusetts, cited in the majority opinion. They relate to horse cars, which are likened to ordinary vehicles, because of their low speed, and the ease with which they may be stopped.

It is true that the introduction of a new motive power for the purpose of rapid transit, has not changed the relative rights and duties of carriers and footmen. It is equally true that it imposes upon carriers and footmen alike the duty of exercising greater absolute care. This is true because the rules of relative care have not changed. The carrier is required to use greater care, because of the increased speed of its cars and their greater weight, and the footman must use greater care, because of his knowledge that he is exposed to greater danger.

There are considerations of grave importance which cannot be eliminated from cases of this character. The car cannot be stopped instantly, nor can it be turned from its track. The footman can instantly stop or change his course. Considerations of health and economy require that the populations of large cities occupy extended territories, whence arises the necessity for rapid transit. Transit cannot be rapid as to those aboard the cars and slow as to those crossing the street. The same considerations require that there shall be low fares. From the fact that these carriers have no mysterious sources of revenue, it results that compensation awarded to the careless, though in the form of a judgment against the carrier, must be ultimately paid by its careful patrons. The whole duty of the public in this regard is performed when they compensate those who, while in the exercise of due care, are injured by the carelessness of the agencies which public necessities have called into existence. In view of these and like considerations, I am not willing to seem to believe that it is practicable either to protect those who go upon the crowded streets of cities with slumbering senses, or to compensate them for injuries to which a failure to use their senses contributes.

The course of the trial judge in this case is worthy of commendation. Having devoted enough time to the orderly examination of the case to disclose a conclusive reason why the plaintiff could not recover a verdict according to law, he directed

the verdict, which the law required. The plaintiff had no constitutional or legal right to recover a verdict, upon which he could not recover a judgment. Had the case been submitted to the jury upon general instructions, the court would not have been sitting to administer justice, but to experiment with a verdict. Such a course was required by no right of the plaintiff. It was forbidden by justice to the defendant and by a due regard for the rights of the public in a speedy administration of justice.

BURKET, J., concurs in the dissenting opinion.

## LOESER, ET AL. V. HUMPHREY.

*Supreme Court Commission, Ohio, January Term, 1884.*

(Reported in 41 Ohio St. 378.)

**COLLISION BETWEEN VEHICLES — RUNAWAY HORSE — PERSONAL INJURY — DAMAGE — PROXIMATE CAUSE.** — L. & Co., carelessly and negligently left their horse, which was harnessed and hitched to their wagon, standing in a public street, without being properly tied or guarded. The horse ran away, and the wagon violently collided with the wagon of H., in which he was sitting, whereby he received severe bodily injury. At the time of his injury, H. was free from contributory negligence. Immediately after his injury he employed a physician "of good standing and reputation," placed himself under his treatment, and followed his directions.  
*Held:*

1. That, although the physician may have omitted to apply the remedy most approved in similar cases, and by reason thereof, the damage of H. may not have been diminished as much as it otherwise would have been, he may still recover of L. & Co. for his actual damage.

2. That the collision was the proximate cause of the damage.

(Syllabus by the court.)

ERROR to the District Court of Cuyahoga County. The facts appear in the opinion. *Judgment for plaintiff affirmed.*

J. E. INGERSOLL and PETER ZUCKER, for plaintiff in error.

E. J. BLANDIN, for defendant in error.

**Dickman, J.** — The original action was brought in the Court of Common Pleas of Cuyahoga County, by Edward Humphrey against Loeser & Co., for alleged carelessness, in leaving their horse insecurely tied, whereby he broke away and ran with the wagon to which he was harnessed, into the wagon of Humphrey, and severely injured him in his person. At the trial, the plaintiff gave testimony tending to prove that, by reason of the collision and accident, the plaintiff had suffered a concussion of the



spinal cord and brain, resulting in an injury to his eyesight, which was thereby much impaired; and that in consequence of his injuries, his ability to walk was also much impaired, with other consequential damage. The defendants, to maintain the issue on their part, gave testimony tending to prove that the ordinarily approved medical treatment in such cases was to administer currents of electricity to the patient and the injured parts, and that if such had been done in the present case, the condition of the plaintiff would have been better than it was; that for want of such treatment, his condition was rendered worse, and more likely to be permanent than it would have been had electricity been applied. There was a verdict and judgment for the plaintiff. The District Court affirmed the judgment of the Court of Common Pleas, and this proceeding is now prosecuted to reverse the judgment of the District Court.

The only assignments of error which we deem it material to consider are, that the court erred in its charge to the jury, and in refusing to charge the jury as requested by the defendants below. The court charged in reference to the medical treatment of the plaintiff for his injuries, as follows:

"If the plaintiff is entitled to recover any damages, then he is entitled to recover an amount sufficient to compensate him for the injury which he has actually sustained, so far as the damages to him naturally and directly flowed from and were caused by his wounds, bruises, etc., caused by defendants' acts or negligence complained of. After the plaintiff was injured he was bound to use ordinary care and prudence, under all the circumstances, to take care of himself and his wounds; and if he employed a physician of good standing and reputation, supposing and having reason to think he was such, and who, in fact, was such, as it is admitted he was, in this case, then, though the physician may not have used all the approved remedies, or that remedy which would have been most suitable in the case, or which a good medical man would have used, under the circumstances, and on account of the failure to use such usual or proper remedy, his condition is worse than it would be had it been used; still, plaintiff may recover for his actual damages, if he himself has not been negligent; and such treatment or failure to use such remedy merely will not prevent him from recovering the full extent of his injuries as aforesaid."

It is contended on behalf of the plaintiffs in error, that the

court, in this portion of its charge, interfered with the province of the jury, and withdrew from them the determination of the question whether Humphrey had used ordinary care in providing himself with a physician, and virtually said to them, that if Humphrey employed a physician of good standing and reputation, he had thereby exercised ordinary care. Whether the instruction of the court on this point was erroneous or not, we deem it unnecessary to inquire, as we do not consider the instruction material, it not having been claimed at the trial, and the record disclosing no evidence that there was any want of ordinary care and prudence on the part of Humphrey, in securing proper medical or surgical assistance. As an instruction to the jury in reference to the care which he should have exercised in employing a physician, was not, therefore, material, the judgment will not be reversed, on the ground that such instruction was erroneous. *Loudenback v. Collins*, 4 Ohio St. 251; *Creed v. Com. Bank of Cincinnati*, 11 Ohio, 489; *Wash. Mut. Ins. Co. v. Reed*, 20 Ohio, 202, 206, 207; *Kugler v. Wiseman*, 20 Ohio, 361; *Walker v. Lessee of Devlin*, 2 Ohio St. 605.

It is conceded that at the time Humphrey was injured, no negligence of his own contributed to his injury. His cause of action was then complete, and Loeser & Co. became liable for the natural and proximate consequences of the collision occasioned by their negligence.

In tracing the boundary between consequences, proximate and remote, it is difficult, as remarked by Professor Parsons, to lay down a definite rule of great practical value or efficacy, in determining for what consequences of an injury a wrongdoer is to be held responsible. *Law of Contracts*, vol. 2, p. 457. In *Harrison v. Berkley*, 1 Strobb. 548, it was said, "He shall not answer for those which the party aggrieved has contributed by his own blamable negligence or wrong to produce, or for any which such party, by proper diligence, might have prevented."

There can be no dispute but that Humphrey acted in good faith, showed due diligence, and used reasonable means to effect his cure and restoration. He employed a physician "of good standing and reputation." It was not incumbent upon him to incur the greatest expense, and call in the most eminent physician or surgeon of the highest professional skill, and most infallible judgment, before he could hold the defendants answerable for the condition in which he was left at the end of his medical

treatment. Having exercised ordinary care and reasonable judgment in selecting a physician, he was not required, as said by the court, in *Stover v. Bluehill*, 51 Me. 439, "to insure, not only the surgeon's professional skill, but also his immunity from accident, mistake or error in judgment," in order to recover of the original wrongdoer, damages arising from no fault on his part, and from causes beyond his power to control.

It seems to be well settled, that where one is injured by the negligence of another, if his damage had not been increased by his own subsequent want of ordinary care, he will be entitled to recover of the wrongdoer to the full extent of the damage, although the physician whom he employed omitted to apply the remedy most approved in similar cases, and by reason thereof the damage of the injured party was not diminished as much as it otherwise would have been. *Lyons v. Erie R'y Co.*, 57 N. Y. 489; *Tuttle v. Farmington*, 58 N. H. 13; *Stover v. Bluehill*, *supra*; *Bardwell, et. al. v. Jamaica*, 15 Vt. 438; *Collins v. Council Bluffs*, 32 Iowa, 324; *Rice v. Des Moines*, 40 Iowa, 638; *Eastman v. Sanborn*, 3 Allen, 594; *Page v. Bucksport*, 64 Me. 51.

The collision must be treated as the proximate cause of Humphrey's damage. It was that that imposed upon him the necessity of employing a physician, and of being subject to all the contingencies attendant upon the present imperfect state of medical science. In *Insurance Co. v. Boon*, 5 Otto, 117, Strong, J. said, "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation." In *Byrne v. Wilson*, 15 Irish C. L. 332, 342 (1), a stagecoach, by the negligence of the driver, was precipitated into a dry canal. The lock-keeper thereafter negligently opened the gate of the canal and drowned a passenger. Under Lord Campbell's act, the Irish Court of Queen's Bench held that the death of a passenger under such circumstances, in the language of the act, was "caused" by the negligence of the driver. The passenger would not have lost her

1. In *BYRNE v. WILSON*, 15 Irish Com. Law Rep. 332, it appeared that defendant was a carrier of persons, in whose omnibuses passengers were conveyed from one part of Dublin to another. Plaintiff's intestate was a passenger, who was by defendant's negligence precipitated into a canal and drowned. Defendant claimed that the real cause of the death was the opening of the lock by the keeper, thus letting in the water. Held, that, although the death of passenger was not immediately caused by the defendant's act, yet it was such a consequential result of defendant's act as would entitle the personal representatives of the deceased to maintain an action.

life but for the subsequent act of letting in the water, which was not the necessary consequence of the previous precipitation by the negligence of the defendant's servant. But, in the opinion of the court, the defendant was not relieved from liability for his primary neglect, by showing, that but for such subsequent act, the death would not have ensued. And in *Page v. Bucksport*, 64 Me. 51, the plaintiff was driving over a defective bridge, in the defendant town, when, without his fault, the horse broke through the bridge and fell. The plaintiff, in trying to extricate the horse received a blow from the horse's head, and was injured by it. He was at the time exercising ordinary care. It was held, that the defect in the way was the proximate cause of the injury.

The defendants requested the court below to charge the jury, that "if the attending physician did not give the plaintiff the ordinarily approved treatment, and his case is worse on that account than it would otherwise have been, then, to that degree the defendants would not be liable for his said worse condition." The court refused so to instruct the jury, and in so refusing, we think there was no error. If the condition of Humphrey was worse because his physician did not give the ordinarily approved treatment, it cannot be attributed to any want of care and prudence on Humphrey's part, in securing medical or surgical aid.

The judgment of the District Court, we are of opinion, should be affirmed. Judgment accordingly.

## BELLEFONTAINE & INDIANA RAILROAD COMPANY v. SNYDER.

*Supreme Court, Ohio, December Term, 1868.*

(Reported in 18 Ohio St. 399.)

**CHILD CROSSING TRACK RUN OVER BY GRAVEL TRAIN — IMPUTED NEGLIGENCE — DUTY OF PARENTS — LIABILITY OF RAILROAD COMPANY FOR INJURY TO CHILD. — 1.** The negligence of a parent or custodian of a child cannot be imputed to the child, to bar its right of action against others for injuries resulting from their wrongful acts (1).

2. It is the duty of persons in charge of cars, passing along streets or other frequented places to exercise great caution; and if, by failure to do so, a child of tender years is injured, the company represented is liable in

1. See Note on Imputed Negligence in 11 AM. NEG. CAS. 151-156.

an action by the child, notwithstanding the negligence of the parent in permitting it to be upon the track, or of the person in charge of the child in not keeping a proper lookout for the cars (1).

(Syllabus to official report.)

ERROR to the Court of Common Pleas of Crawford County. Reserved in the District Court. *Judgment for plaintiff below affirmed.*

"Mary Snyder, the defendant in error, a child six years old, was run over and seriously injured by a gravel train of the Bellefontaine and Indiana Railroad Company. She brought her action against the company, charging that the accident occurred through the negligence of its employees. The company answered, denying the negligence, and alleging that the plaintiff, or those having her in charge, were guilty of negligence, contributing to the injury. The plaintiff below replied, denying the contributing negligence. The cause was submitted to a jury, and on the trial a bill of exceptions was taken, embodying all the testimony, which is substantially as follows:

"The accident took place near a depot, in the village of Crestline, where there are several tracks and side tracks, parallel and near to each other. At the time it occurred, Mary and her sister, some eleven or twelve years of age, were crossing the track, on their way to school, at a point where there was no public highway, but where school children and others were in the daily habit of crossing and re-crossing, without objection on the part of the company. The parents of the children resided near by, and it was by their permission that the girls crossed and re-crossed the tracks alone at this point. As the children approached the tracks, the gravel train of the company passed upon a side track northward to a switch, a few rods distant, and

1. See also BELLEFONTAINE R'y Co. v. SNYDER, 24 Ohio St. 670 (1874), the facts being substantially the same as in the case at bar (18 Ohio St. 399), the only material difference in the cases being, that in the former case (18 Ohio St. 399) the action was brought by the injured child itself, and in the latter case (the subject of this note, 24 Ohio St. 670), the action was brought by the father for the loss of the child's services. The trial resulted in verdict and judgment for plaintiff for \$1,270, which, on appeal, was reversed (White, J. and Day, Ch. J., dissenting). It was held that "where an infant child, intrusted to the care and custody of another, by the father, is injured through the negligence of a railroad company, the custodian of the child also being guilty of negligence, contributing to the result, although the infant may maintain an action for such injury, the father cannot, the negligence of his agent, the custodian of the child, being in law, the negligence of the father."

was seen by the girls. The girls then started to cross the tracks, but seeing an express train about to pass upon one of the main tracks in front of them, they stopped a short time — minute or less — upon one of the intermediate tracks to await its passage. While so standing upon the track, their attention was drawn to the passing express, and they did not look in the direction of the gravel train, which they could plainly have seen had they looked. Meantime the gravel train had switched on the track upon which the girls stood, and backing toward them at a very slow rate, it struck Mary, and occasioned the injury complained of. A brakeman, whose duty it was to keep a lookout upon the track for objects of danger, was stationed in the front car of the gravel train; but he, too, gave his whole attention to the passing express train, and, therefore, failed to see the girls, or to adopt any means for the avoidance of the accident. As to whether any whistle or other alarm was sounded, to signal the movement of the gravel train, the evidence is conflicting; but if any was given, it was not heard by the girls, or by those near them, on account of the noise made by the passing express train. The gravel train, at the rate it ran, could have been stopped in a distance of fifteen feet. It was an irregular train, and the custom had been to sound the whistle or ring a bell when it passed the place in question. The express train was on its regular time, and belonged to another company. Had the brakeman on the gravel train looked ahead, he could have easily seen the girls and avoided the accident; and had the girls cast their eyes toward the approaching gravel train, they would have had no trouble in seeing it and stepping out of the way. Mary was in the charge of her sister, who held her by the hand."

On these facts the company asked the court to charge the jury: "That it is the duty of a person approaching a railroad crossing to look along the line of the railroad to see if a train is coming; and if the jury believe that the plaintiff, or the person having charge of her failed to take such precaution, or omitted such duty, she was guilty of negligence, and cannot recover." And also: "That if the fact is undisputed that the plaintiff and her sister, having her in charge, at the time of the injury, were either standing upon the track or were approaching it for the purpose of crossing, and went on the track, at the time of the collision, without looking to see if a train were approaching — that in such case, such undisputed want of care and caution is,

in law, such negligence as will prevent a recovery, unless the injury was wantonly inflicted." Which request the court refused to charge, but did charge that such acts or omissions were evidence of negligence on the part of the plaintiff, to be considered by the jury, and not such acts or omissions as the law declared amounted to negligence.

The company also asked the court to charge the jury: "That under the pleadings in this case, the plaintiff is not entitled to excuse herself from fault or negligence, contributing to the injury, on the ground that she was a minor of immature years, and, therefore, incapable of appreciating the danger." "That if the plaintiff was so young as not to appreciate the danger, and make use of the ordinary means required in law of one of more mature years to avoid danger, and, knowing such incapacity, her parents permitted or directed her to cross the track, and there be subjected to the danger of injury, such negligence of the parents is, in law, imputed to the plaintiff, and by reason thereof the plaintiff cannot recover." Which request the court refused to charge, on the ground that the propositions were not properly in the case, as the plaintiff was in charge of an older person, and that the law was, as claimed by the defendant, in its fifth proposition, which was as follows: "That if the plaintiff was so young as not to appreciate the danger and make use of the ordinary means required in law of one of more mature years, and, knowing the same, her parents sent her under the charge of an older sister, capable of appreciating the danger and avoiding the same, and such older sister, while having the care of the plaintiff attempted to cross the track without looking or otherwise making use of the ordinary means which would have enabled her to avoid the danger, and by reason of such omission the plaintiff approached or passed on to the track, in her company, without knowledge of the danger, and was injured, the negligence of the sister, under such circumstances, is to be imputed to the plaintiff; and the same rule applies as if the plaintiff were an adult, and she cannot recover, if such negligence contributed immediately to the injury."

The jury returned a verdict of \$6,000 for the plaintiff. A motion for a new trial, on the ground that the verdict was against the law and evidence, was made by the company and overruled by the court, and judgment was entered on the verdict. The company filed a petition in error in the District Court to reverse

this judgment, on the ground that the verdict was contrary to the law and the evidence, and that the court misdirected the jury on the trial. The case was reversed in the District Court for decision in this court."

BACKUS, ESTEP & BURKE, for plaintiff in error.

JENNER & JENNER and T. W. BARTLEY, for defendant in error.

**Welch, J.** — What the counsel of the plaintiff in error insist upon is: 1. That the court erred in leaving it to the jury to say, whether Mary or her sister were guilty of negligence, contributing to the result, and in refusing to instruct them, that the failure of the girls to look along the line of the road was, in law, such negligence. 2. That the jury were wrong in finding that there was no such negligence in fact.

Both these propositions rest upon the assumption, that this is a case for the application of the doctrine of what is called "imputed negligence." In other words, it is claimed, that, although the plaintiff, being a mere child, was incapable of negligence, yet the negligence of the parents, as assumed in the charge asked, or of the elder sister, as declared by the court in its charge, is to be imputed to the plaintiff, and to stand as a bar to her recovery. If such is not the law of the case, neither of these propositions have any foundation whatever, and the whole case is disposed of at once. Because, it cannot be denied that the jury were fairly justified in finding the company guilty of negligence; it is not claimed that the child was capable of actual negligence; and the charges refused to be given by the court were based upon, and involved, this doctrine of imputed negligence, and might well have been refused upon that ground. And although the court put its refusal upon other grounds, and charged that it was a case for imputed or constructive negligence, yet the error, if any, was not an error to the prejudice of the company, but in its favor. If, therefore, it be not the law of such a case, that the child is chargeable, by imputation or implication, with the carelessness or fault of the parents or sister, then there was no error, either in the charge of the court or the finding of the jury. Is such the law of the case? This is an important question — rendered peculiarly so at the present time, by the extensive and increasing use of railroads in the country — and we have given it that careful consideration which its importance seems to us to demand. So far as we know, it is a new question in this State.



It is well settled that an adult person capable of self-control cannot recover for injuries occasioned by negligence, where he has himself also been guilty of negligence which contributed to the result. This rule of law is founded upon reason, and considerations of justice and public policy, which it seems to us are wholly inapplicable to the case of an infant plaintiff. These reasons and considerations are: 1. The *mutuality* of the wrong, entitling *each* party alike, where both are injured, to his action against the other, if it entitles either; 2, the impolicy of allowing a party to recover for *his own* wrong; and 3, the policy of making the *personal interests* of parties dependent upon *their own* prudence and care. All these are wanting in the case of an infant plaintiff. No action can be maintained against *him* for the negligence of his parent or custodian; and it is difficult to perceive what principle of public policy is to be subserved, or how it can be reconciled with justice to the infant, to make his personal rights dependent upon the good or bad conduct of *others*. It is the old doctrine of the father eating grapes, and the child's teeth being set on edge. The strong objection to it is its palpable injustice to the infant. Can it be true, and is such the law, that if only one party offends against an infant, he has his action, but that if two offend against him, their faults neutralize each other, and he is without remedy? His right is to have an action against both.

We are aware that the doctrine is not without authority. It is roundly asserted, both in American and English cases, that wherever the negligence or fault of an adult would bar his right of action, the like negligence or fault of the parent or custodian of the infant will be imputed to him, and operate to bar his right. We have examined most of these authorities with some care, and the result is a conviction that in most of the cases the assertion of the doctrine amounts to little more than mere *dicta*. If we look at the cases themselves, aside from the mere reasoning of the judges, who delivered the opinions, they warrant the declaration of no such general rule, and the adjudications therein can be maintained without its aid. The utmost that can fairly be claimed from the authorities is that the rule is applicable to *some cases*, to be determined by the nature of the negligence of defendant. In all of them it seems agreed, that it has no application to cases of "willful," or what some of them denominate "culpable" or "gross" negligence. In most of them its application is

limited to cases of "slight" or "remote" negligence. And in some of them — particularly the cases in Illinois — its application is made to depend upon the comparative amount or degree of the negligence of the defendant, and that of the parent or guardian of the child. A close examination of the cases, it seems to us, will show their distinguishing feature to be, that the injury resulting from the defendant's negligence was out of the *ordinary sequence* of events, and, therefore, such as a person exercising proper caution and forethought, under the circumstances, could not have *anticipated or expected*. If this characteristic is not common to all of these cases, it is to most of them, and while we do not quarrel with the decisions, or results reached in most of them, we should prefer to place them upon the ground indicated — that the injury was not the legitimate *consequence* of defendant's negligence — rather than upon the dangerous ground that the child, in some mysterious and unnatural sense, is accountable for the negligence of its parent or guardian.

We speak, of course, alone of the cases in which the doctrine of imputed negligence has been declared. The weight of authority, in our judgment, as well as the reasoning, is against the adoption of the doctrine in any form, or under any circumstances.

The leading English case on the subject is *Lynch v. Nurdin*, 1 Q. B. 29 (1). The defendant had left his horse and cart standing in the street, and the plaintiff, a small boy, with other boys, climbed upon the cart and started the horse, whereby the plaintiff was injured. The court held that the plaintiff was entitled to recover, notwithstanding his wrongful act of climbing upon the cart. The court say, in substance, that no greater degree of care and prudence than the plaintiff exhibited could be "expected" from the child; that he simply obeyed his "childish instincts;" and that the accident was no more than what might have been anticipated by the defendant, as a "probable" occurrence, under the circumstances.

Much to the same effect, so far as this question is concerned, are the cases of *Rigby v. Hewitt*, 5 Exch. 240; *Greenland v.*

1. In *LYNCH v. NURDIN*, 1 Q. B. 29, 4 P. & D. 672, it was held that the rule of law, that a plaintiff, who had contributed to an injury occasioned by the negligence of the defendant, cannot recover a compensation in damages, does not apply where the plaintiff is a person incapable of exercising ordinary care and caution. The facts in *Lynch v. Nurdin* are sufficiently stated in the opinion in the case at bar.

Chaplin, 5 Exch. 243; Quarman v. Burnett, 6 M. & W. 499; Reedie v. L. & N. W. R'y Co., 4 Exch. 244; Daniels v. Potter, 4 Car. & P. 262; Dixon v. Bell, 5 M. & S. 198; Jay v. Whitfield, 4 Bing. 644; Lygo v. Newbold, 9 Exch. 302; and Gardner v. Grace, 1 Fost. & Finl. 359. The cases of Waite v. N. E. R'y Co., 5 Jurist, 936; Hughes v. Macfie, 2 Hurl. & Colt. 748; Singleton v. Eastern Counties Railway Co., 7 C. B. N. S. (97 Eng. Com. L.) 287; and Mangan v. Atherton, L. R., 1 Ex. 239, relied upon as shaking the authority of Lynch v. Nurdin, *supra*, are not so to be construed (1). The case of Waite, *supra*, was

1. See the English cases cited in the opinion in the case at bar, abstracts of which are given in the following note:

In RIGBY v. HEWITT, 5 Exch. 240, it appeared that the plaintiff was a passenger on an omnibus, which was racing with the defendant's omnibus, and in trying to avoid a cart, a wheel of the defendant's omnibus came in contact with the step of the omnibus on which the defendant was driving, which caused the latter to swing towards the curb-stone, and the speed rendering it impossible to pull up, the seat on which the plaintiff sat struck a lamp-post, and he was thrown off: Held, that the jury was properly directed that the plaintiff was not disentitled to recover merely because the omnibus on which he sat was driving at a furious rate, and that the collision took place from the negligence of the defendant's omnibus, so that the other omnibus was not in fault in not endeavoring to avoid the accident, and that the defendant was liable.

In GREENLAND v. CHAPLIN, 5 Exch. 243, it was held that a person who is guilty of negligence and thereby produces injury to another, cannot set up as a defense, that part of the mischief would not have arisen if the person injured had not himself been guilty of some negligence.

In QUARMAN v. BURNETT, 6 M. & W. 499, it was held that a person who drives in his own carriage with job horses and a driver hired to accom-

pany them, is not liable for any injury caused to a third party by negligent driving or carelessness of the person so hired, even although he has selected that person from among the servants usually employed by the job master for that purpose. A person hiring job horses and a driver may, however, in such case render himself liable by his own conduct, such as directing the servant to drive in a particular manner, which caused the injury; but this is not in respect of the general relation of master and servant.

In REEDIE v. LONDON & N. W. RAILWAY CO., 4 Exch. 244, the facts were: A railway company contracted, under seal, with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetency. The workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath, along the highway, by allowing a stone to fall upon him: Held, that the company was not liable, and that in such case, the terms of the contract in question did not make any difference.

In DANIELS v. POTTER, 4 C. & P. 362, it was held that a tradesman is also bound to take reasonable care that an appliance, fixed by another, is so placed and secured as that, under ordinary circumstances, it will not fall down; but if the tradesman has so placed and

put upon the footing of a "contract." In the Singleton case, *supra*, both judges say "there was no negligence" on the part of defendant. The cases of *Hughes v. Macfie*, *supra*, and *Mangan v. Atherton*, *supra*, come clearly within the description, above suggested, of cases where the result could not reasonably be expected or anticipated. In all of them the adjudications might

secured it, and a wrong-doer throws it over, the tradesman will not be liable for any injury occasioned by it.

In *DIXON v. BELL*, 5 M. & S. 198, it was held that the law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care; therefore, where a defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and damage accrued to the plaintiff's son, in consequence of the girl's presenting the gun at him, and drawing the trigger, when the gun went off, it was held, that the defendant was liable to damages in an action upon the case.

In *LYGO v. NEWBOLD*, 9 Exch. 302, the facts were: The plaintiff, a person of full age, contracted with the defendant to carry goods for her in his cart. The defendant sent his servant with the cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart, with her goods. On the way, the cart broke down, and the plaintiff was thrown out and severely injured: Held, that as the defendant had not contracted to carry the plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained.

In *GARDNER v. GRACE*, 1 Fost. & Finl. 359, it was held that contributory negligence does not disentitle an infant to recover for an injury sustained, otherwise than where such injury is occasioned entirely by the negligence of the infant.

In *WAITE v. NORTH EASTERN RAIL-*

*WAY CO.*, 5 Jurist, N. S. 936, it appeared that a child, five years old, was in the care of his grandmother, at a station of a railway company. For the purpose of going by it, she purchased a ticket for herself and one for him. In crossing the line to be ready for the train, they were knocked down by a goods train. The jury found that there was negligence in the servants of the company, and in the grandmother: Held, that the child was so identified with his grandmother that, by reason of her negligence, an action in his name could not be maintained against the company.

In *HUGHES v. MACFIE*, 2 H. & C. 744, it was held that contributory negligence by an infant has the same effect in disentitling him to maintain an action as in the case of an adult. The facts in the case were: The defendants were owners of a warehouse, in front of which was a cellar in a public street. The opening of the cellar was covered with a flap or lid, which the defendants raised and leaned against a wall when they wanted access to the cellar. While it was leaning against the wall, a young child, who had been warned not to meddle with it, climbed upon it, and caused it to fall upon himself, and he was injured by the fall: Held, that the defendants were not liable for the injury.

In *SINGLETON v. EASTERN COUNTIES RAILWAY CO.*, 7 C. B., N. S., 287, where a child, three years and a half old, strayed upon a railway, and had its leg cut off by a passing train, it was held, that in the absence of any evidence to show that the child got there through neglect or default on the part of the

well have been placed upon the ground that the injury was not the legitimate consequence of defendant's negligence, but of some extraneous cause.

In this country the cases are conflicting. The law of imputed negligence is denied by the courts of Connecticut, Vermont and Pennsylvania; and it is admitted, in a more or less qualified sense, by the courts of Massachusetts, New York, Indiana and Illinois.

The Massachusetts cases relied upon by counsel for plaintiff in error are *Holly v. Gas Co.*, 8 Gray, 123; and *Wright v. Street Railway Co.*, 4 Allen, 283. In the first-named case, the court deny the child's right of action, expressly on the ground that the injury was not a legitimate result of the defendant's negligence, but was occasioned by the act of the father. In the last-named case, there is no definite proof as to the character of defendant's negligence, but the court lay down in general terms the rule contended for, basing its authority upon the case of *Holly v. Gas Co.*, *supra*, adding, however, that the contrary is the law in England, and in Pennsylvania, Connecticut and Vermont.

The New York cases relied upon are: *Hartfield v. Roper*, 21 Wend. 615; and *Lehman v. City of Brooklyn*, 29 Barb. 234 (1). In both, the court declare that the defendant was guilty of no negligence, and place the decision upon that ground. Anything, therefore, said by the court on the subject of concurring negligence

company, the company was not responsible for the injury.

In *MANGAN v. ATHERTON*, L. R. 1 Exch. 239 the facts were: The defendant exposed in a market place a machine for crushing oil cake, without the handle being fastened, or its being thrown out of gear or in the care of any person. The plaintiff, a boy four years old, on returning from school, under the care of his brother, who was seven years old, stopped, with other boys, at the machine, and while one of them was turning the handle, put his fingers in the cogs of the wheels, on being told by his brother to do so, and three of his fingers were crushed. Held, that the defendant was not liable, as there was no negligence on his part, and the injury was caused by

the act of the plaintiff and the boy who turned the handle.

1. See these cases reported with the New York cases, in this volume of AM. NEG. CAS., *ante*.

On the New York doctrine of Imputed Negligence, see *Hartfield v. Roper*, 21 Wend. 615, reported in this volume, 293, *ante*, to which is appended a note on the same, in which are reviewed the authorities following and rejecting the ruling laid down in that well-known case.

See also the Pennsylvania cases cited in the case at bar reported in this volume, *post*; and the other authorities cited are reported with their respective states in vols. 11 and 12 AM. NEG. CAS.

could only have the force of a *dictum*. In the former case, where a child had been run over by a sleigh, while sitting unobserved upon a road in the country, the court say that if it had happened upon a street in a village or city, it would have been the duty of the driver to "look out" for such accidents, because they are to be "expected" there; but that such is not the case in the country. In the latter case, where a child was drowned in a well, the court expressly say that there was no proof of negligence in the city authorities. And it would seem that in an important New York case, not cited by counsel (*Lannen v. Albany Gas Light Co.*, 46 Barb. 264), the doctrine of imputed negligence is denied.

The cases in Illinois are: *City of Chicago v. Major*, 18 Ill. 360; *Ross et al. v. Innis*, 26 Ill. 259, and *City of Chicago v. Starr's Adm'r*, 42 Ill. 174.

The case against Major was this: A small child, straying some distance from home unprotected, fell into a tank, which had been left open near the sidewalk. The child was allowed to recover, the court placing its opinion upon the ground that "a large majority of children living in cities depend upon the daily labor of their parents for subsistence," and the parents are "unable to employ nurses" to watch and control them. The court say that it is not true "that every time a child steps into the street unattended the mother is guilty of such negligence as would authorize the city to set traps and pitfalls for 'it.'"

In *The City of Chicago v. Starr's Adm'r*, 42 Ill. 174, which is much relied upon in support of this doctrine, the above language in *Chicago v. Major*, *supra*, is quoted by the court, with the remark, "we agree with every word of this." The case was an action by the administrator of a child, who had been killed by the falling of a heavy counter, which had been placed upon its edge, leaning against a fence, on the border of the sidewalk, so as slightly to obstruct the walk, but not so as to be at all *dangerous* to passengers upon the walk. The child had wandered unprotected a long distance from home, and by climbing upon the counter, caused it to fall, thereby occasioning the death of the child. The only fault of the city was in permitting the counter to remain to the obstruction of the sidewalk. There was nothing in the case to show that the city officers, whose duty it was to remove the counter, could have reasonably "anticipated" any such serious casualty, or any evil beyond the simple inconvenience

to travel, as the possible "*consequence*" of their omission; and it is upon this ground, mainly, that the court place their decision against the plaintiff's right to recover. The court say, among other things: "But while this counter was an obstruction, it was certainly but a very *slight* one. \* \* \* During the two or three weeks it remained upon the sidewalk, it probably never occurred to any one who saw it that human life or limb would be *jeopardized* by its presence there." \* \* \* The most prudent and cautious persons would not have *anticipated* such an accident. \* \* \* The degree of negligence is not to be judged of by a single accident. \* \* \* The question is, rather, what would have been the course of a prudent person prior to the accident. \* \* \* What would a prudent person have thought of the *liability* to cause the injury."

In the case of *Ross et al. v. Innis*, 26 Ill. 259, where a recovery was denied to an adult for injuries received while improperly attempting to pass under a car, which had been carelessly left standing upon the street in the night season, the court go out of the case to say: "And whilst the company were guilty of such negligence as would have rendered them liable for injury to a child, yet the deceased, being an adult, must be presumed to be endowed with sufficient reason to enable him to exercise ordinary prudence."

In the two cases decided in Indiana (*P., F. & C. R. R. Co. v. Vining*, 27 Ind. 513, and *L. & I. R. R. Co. v. Huffman*, 28 Ind. 287), the existence of the rule contended for seems to be taken for granted, but the facts in regard to the negligence of the defendant are not definitely shown.

In the cases in Connecticut and Vermont (*Birge v. Gardiner*, 19 Conn. 507; *Daley v. N. & W. R. R. Co.*, 26 Conn. 358, and *Robinson v. Cone*, 22 Vt. 213), the doctrine is squarely denied.

The same is also true of the Pennsylvania cases (*Penn. R. R. Co. v. Kelly*, 7 Pa. St. 372; *Rauch v. Lloyd*, 31 Pa. St. 358; *P. & R. R. Co. v. Spearen*, 47 Pa. St. 300; *Glassey v. Hestonville*, etc., 57 Pa. St. 172, and *N. P. R. R. Co. v. Mahoney*, 57 Pa. St. 187), unless there may be some doubt (and we think there need be none) as to the case of *R. R. Co. v. Spearen*, 47 Pa. St. 300. The counsel for plaintiff in error seem to rely upon the last-named case, and ask us to examine it carefully. We have done so, but fail to see that it supports them. "The case is," says the court, in delivering its opinion, "simply that of a

little thoughtless child running suddenly to cross before an engine, at a place where the engineer would not *expect* it, and being knocked down before the engine could ordinarily be stopped, \* \* \* and where the disputed fact, whether the engine whistled before it came to the *crossing*" (which was near by, but had already been passed) "could not have had anything to do in causing the injury." Indeed, the case was decided, substantially, upon the ground that the company was guilty of no negligence contributing to the injury. Yet the court are careful to say, "it is a hard rule that would hold a child of five years of age to the same measure of care and diligence which is required of adults."

In *Rauch v. Lloyd*, 31 Pa. St. 358, the evidence showed that the plaintiff, a child of tender years, unattended, attempted to pass under a car wrongfully left standing upon the street, and was injured by the starting of the car. The court held that although the attempt to pass under the car would have been recklessness and concurring negligence in an adult such as to prevent a recovery, it was not such in the child. The same doctrine was held in *Penn. R. R. Co. v. Kelly*, 31 Pa. St. 372.

The most recent cases on the subject are the above-named cases, in 57 Pa. St. In the former, *Glassey v. Hestonville*, p. 172, the court holds that a father, guilty of negligence contributing to the injury, will be denied his action for the injury to the child; and the court approves the decision made in a former case (*Smith v. O'Connor*, 12 Wright, 223), to the same effect. The court says: "Although an infant of tender years may recover against a wrong-doer, for an injury which was partly caused by his own imprudent act, an adult father cannot."

But the most important case to be considered is that of *N. P. R. R. Co. v. Mahoney*, p. 187. It is important, because it is elaborately argued and considered, and because it is almost identical with the case at bar. The plaintiff was a child of four years, who had been run over by an engine and tender, passing, with the tender in front, slowly through a street in the vicinity of several schools. The child was unattended, but its aunt, in attempting to rescue, was guilty of negligence which contributed to the accident resulting in her death and the injury to the child. The fault of the railroad company consisted in so piling the wood upon the tender as to obstruct the engineer's view ahead, and in the engineer's failing to look out, as he might



have done through a window, upon the track, or to place a sentinel on the tender. The court held the plaintiff entitled to recover. In delivering the opinion the District Court, among other things, says: "If, however, this was an action by the father to recover damages for the death of the child, a very different question would be presented. It would probably be held that it was negligence to suffer an infant to be on the streets without a care-taker, and he could not hold the defendants responsible, whether he had appointed a care-taker who was negligent, or left the child to roam at large without one. *To a child of plaintiff's years no contributory negligence can be imputed.* \* \* \* *She is not precluded from recovery against one joint tort-feasor by showing that others have borne a share in it.*" This opinion was fully approved and the judgment affirmed in the Supreme Court.

The foregoing are all the leading authorities on the subject. Upon careful review of them, we are inclined to follow those where the principle of imputed negligence has been denied. It follows, of course, that there is no error in this judgment. Indeed, it seems to us the same result must be reached in the present case, whether the principle contended for be adopted or rejected. The injury here was within the ordinary and probable sequence of events, a result of the defendant's negligence. It might reasonably have been *anticipated*. There was *danger* of its happening, such as an ordinarily careful and prudent person might have apprehended, and would be *likely* to apprehend, as a possible result of any relaxation of vigilance and care.

As to the fact of negligence, we are concluded by the finding of the jury. There was evidence tending to show that no whistle or bell was sounded, and we cannot say, with that certainty which justifies us in setting aside the verdict of the jury, that they were wrong in so finding. The failure of the brakeman to keep a lookout upon the track is expressly found by the jury, and is not denied. Under the circumstances, this was a clear omission of duty. He was a man, and the parties upon the track were children. His experience and supposed skill enabled him to know and appreciate, better than the girls could, the danger of the situation, and the means necessary to avoid it. He may fairly be presumed to have known the time of the express train, and the effect of the noise it would make, and of the curiosity it might excite among children and other persons

upon or near the tracks. Under such circumstances, involving danger to human life, it is only the common dictate of humanity to say that a high degree of caution should be required, and that any relaxation of it is negligence. Perhaps we ought not to say, in a case like the present, that it amounts to censurable or gross negligence. We are all liable at times — the very best and most prudent of men are — to lapse and become forgetful, not only of danger to others, but also of danger to themselves. It is human to err, and the lives of the best of us are full of errors. But the errors of each should be made to fall upon himself rather than upon others; and where that cannot otherwise be effected, the law wisely and justly requires from the party at fault a fair and adequate compensation to the innocent party aggrieved.

We think, therefore, upon any view of the law of this case, that there was no error in the proceedings of the court below; and, for the reasons already assigned, we are constrained to place our decision upon the broad ground that an infant cannot be deprived of his action against a wrongdoer, by reason of the concurring fault of a third person.

Judgment affirmed. DAY, Ch. J., and BRINKERHOFF, SCOTT and WHITE, JJ., concurred.

CHILD INJURED BY BACKING TRAIN AT CROSSING — PLEADING — CONTRIBUTORY NEGLIGENCE — TRAIN BLOCKING CROSSING — CLIMBING OVER CARS — QUESTION FOR JURY. — In LAKE ERIE & WESTERN R. R. CO. v. MACKEY, 53 Ohio St. 370 (1895), child injured by backing train at crossing, judgment for plaintiff below was affirmed, the syllabus by the court stating the case as follows:

"1. It is not error for a reviewing court to refuse to treat as part of a bill of exceptions a deposition claimed to be the identical deposition given in evidence at the trial, where such deposition is attached to the bill only by being placed between the pasteboard back and the stenographer's report (although held with sufficient tenacity to retain its place), and not marked as an exhibit, nor identified by either the trial judge, nor the stenographer, nor by any one.

"2. Where a petition in an action against a railroad company for personal injuries charges that defendant negligently and unlawfully stopped a freight train across a public highway for a period of more than five minutes, and that while plaintiff, after the expiration of that period, was attempting to cross the street between the cars,

defendant, without warning, wrongfully and negligently backed the train, causing plaintiff's injuries, such two charges of negligence are not separable in the sense that one only would be the proximate cause of the injury; taken together they constitute a sufficient allegation of negligence as against a general demurrer.

"3. A child of nine years of age is not guilty of negligence if he exercises that degree of care which, under like circumstances, would reasonably be expected from one of his years and intelligence. Whether he used such care in a particular case is a question for the jury. And even though the petition might, if the plaintiff were an adult, be construed as disclosing contributory negligence, an averment that the plaintiff was at the time a child of nine years of age, and of immature experience and judgment, is sufficient to rebut the presumption of contributory negligence.

"4. Where, in such case, the evidence at the trial tends to show that a freight train has been permitted to stand across a public street beyond the period of five minutes, to the hindrance or inconvenience of travel thereon, in violation of section 6980, Revised Statutes, and persons rightfully on the street are passing between the cars of the train, it becomes a question for the jury whether or not it is negligence for the company's servants to move the train without giving warning of their intention to do so.

"5. Whether, under such circumstances, a child of nine years who attempts to cross and in doing so climbs upon the coupling of a car, is a trespasser or not, is a question for the jury.

"6. It is also a question for the jury whether or not the mere presence of the train is to be taken as notice to such child that the train is likely to be moved at any time."

On the point decided as per paragraph 2 of the syllabus, the court (per SPEAR, J.) said: "It is insisted that the petition fails to state a cause of action, and that the trial court, therefore, erred in overruling a general demurrer to that pleading. The criticisms are that there is no averment that the train was unnecessarily detained on the crossing; that the allegations of negligence are mere epithets, and not a statement of the omission of any duty, and that the presumption of contributory negligence arising from the facts stated is not overcome by proper averments. Omitting formal parts, the petition alleges, in substance, that the plaintiff was a minor, of the age of nine years; that defendant's track through the village of Coldwater intersects and crosses Main street at grade; that Main street is a common thoroughfare and highway, the principal street of said village, and the point of junction, both a public highway and street crossing, necessarily much used and frequented by the

public. On June 5, 1890, the defendant did negligently and unlawfully, and without due care on the part of the servants of said defendant in charge thereof, leave a long train of freight cars attached to a locomotive, standing upon and over, obstructing and blocking said crossing for a period of more than five minutes, without any attention to said crossing or the consequence to the convenience or life and limb of persons having occasion to pass such obstruction. That at the time aforesaid, during the hour of noon of said day, while said train was so unlawfully standing on said crossing, the plaintiff, a child of tender years and immature experience and judgment, was lawfully passing along said street, going to a point beyond said crossing on Main street. When arriving at said crossing and in full view of the engineer's position, and in full view of any servant being on the lookout or keeping watch over said train, he found said crossing so obstructed and blocked by said defendant's train; that after remaining at said crossing for more than five minutes, and receiving no warning, plaintiff, in full view of the engineer's proper position, and within the knowledge of ordinary prudence of defendant's servants, attempted to pass over and cross such obstruction. While so passing over said cars, defendant's servants, without any care or attention to said crossing, or the consequence to any one attempting to pass such unlawful obstruction, without due care, without signal, without notice, without warning, did then and there imprudently, carelessly, negligently and wrongfully start said cars suddenly and violently backward, whereby said plaintiff's right foot was caught between the couplings of two cars, and the injury followed.

"If the action were to recover the penalty prescribed by section 4748, Revised Statutes, or to recover damages arising to any person by reason alone of obstruction, it would be necessary to aver that the obstruction was continued unnecessarily, for that condition is incorporated in the statute. But section 6890, Revised Statutes, which provides that 'any person who permits any car or locomotive of which he has charge to remain upon or within thirty feet of the center or across any public road, street or alley, for a period longer than five minutes \* \* \* shall be fined,' etc., does not impose the requirement of showing that the cars were so permitted to remain unnecessarily, and the language quoted clearly implies the duty to remove the obstruction, after the lapse of five minutes. Notice of this statute being taken, the neglect of duty is implied from the statement of the fact of continued obstruction. So construed, the petition makes a case of violation of duty, and this, with the averment that the act was negligently done and the further

allegation that the starting of the cars, by which the injury was immediately caused, was done negligently, without warning and wrongfully, we think is sufficient charge of negligence as against a general demurrer. The general rule is that allegations which adequately state the facts of negligence are sufficient to constitute a good pleading." \* \* \* (MARSH & LOREE, W. E. HACKENDORN and JOHN B. COCKRUM, appeared for plaintiff in error; ROBERT L. MATTINGLY, PATRICK E. KENNEY and EDGAR B. KINKEAD, for defendant in error).

**CHILD RUN OVER AND KILLED ON RAILROAD TRACK — STATUTORY ACTION — BENEFICIARIES — PLEADING AND PRACTICE.** — In *WOLF, ADM'R, v. LAKE ERIE & WESTERN RAILWAY CO.*, 55 Ohio St. 517 (1896), child, fourteen months old, wandering on railroad track, and run over and killed by train, the questions turned on the statutory right of recovery and the interest of the beneficiaries, the syllabus by the court stating the case as follows:

"1. In actions in the name of an administrator, under sections 6134 and 6135, Revised Statutes, the administrator is a mere nominal party, having no interest in the case for himself or the estate he represents, and such actions are for the exclusive benefit of the beneficiaries in said sections named.

"2. In arriving at the total amount of damages, in such cases, the jury should consider the pecuniary injury to each separate beneficiary not found guilty of contributory negligence, but the verdict should be for a gross sum, not exceeding \$10,000.

"3. In such actions, the defense of contributory negligence is available as against such beneficiaries as, by their negligence, contributed to the death of the deceased, but the contributory negligence of some of the beneficiaries will not defeat the action as to others who were not guilty of such negligence."

The statement of facts in the official report, which sufficiently states the case, is as follows:

"Error to the Circuit Court of Mercer County.

"The deceased, Tony Meyer, aged fourteen months, the son of George Meyer and Viola V. Meyer, was killed by a train on the Lake Erie and Western Railroad, on the 9th day of September, 1893. Thereupon Amos Wolf was appointed administrator of his estate, and brought an action against the railroad company, seeking to recover the sum of \$1,999 damages for the negligent killing of said Tony Meyer.

"The railroad company filed its answer, the second defense being

as follows: 'For the second ground of defense the defendant says: That George Meyer and Viola V. Meyer are the only next of kin of Tony Meyer, deceased; that they are the sole beneficiaries of this action. That said George Meyer and Viola V. Meyer, at the time of the alleged injury to their infant child, Tony Meyer, lived in and occupied a dwelling house, situate upon lot No. —, in the village of Celina, which said lot adjoined the right of way of said defendant. That on said lot and along the line of the right of way of defendant, at the time of the injury complained of, and for a long time prior thereto, was a good and substantial fence. That on the said 9th day of September, 1893, the said George Meyer and Viola V. Meyer, well knowing the location of said defendant's railroad, and defendant's operation of its trains thereon, wilfully and carelessly left the gate situate in said fence open, and carelessly and negligently permitted their said infant child, Tony Meyer, to wander through said gateway, out to and upon the defendant's railroad track, and while said child was so upon said defendant's railroad track, and without fault or negligence of the defendant or its employees, said defendant's locomotive ran upon said child, and caused the injury complained of. The defendant therefore asks to be dismissed with its costs.'

"Counsel for the administrator filed a motion to strike out this second defense, and by agreement of all parties, this motion was regarded and treated by the court as a general demurrer to said defense. The court sustained the demurrer, to which the railroad company excepted. Upon trial to a jury, a verdict was returned for the full amount claimed in the petition. A motion was made for a new trial, and on the hearing thereof the administrator, acting upon the suggestion of the court, remitted all above \$1,500, and thereupon the court overruled the motion and entered judgment for the sum of \$1,500, to all of which the railroad company excepted, and took a bill of exception, containing all the evidence.

"The Circuit Court was of opinion that the Court of Common Pleas erred in sustaining the demurrer to the second defense, and that there was no other error in the record, and for that reason alone reversed the judgment, and proceeding to render such judgment upon the demurrer, as the Court of Common Pleas should have rendered, overruled said demurrer and remanded the case for a new trial. Thereupon the administrator filed his petition in error in this court, seeking to reverse the judgment of reversal of the Circuit Court." The Supreme Court (per BURKET, J.) affirmed the judgment, the ruling being shown in the foregoing syllabus. (TOUVELLE & KENNEY and EDGAR B. KINKAD, appeared for

plaintiff in error; A. D. MARSH, JOHN W. LORRE, W. E. HACKEDORN and JOHN B. COCKRUM, for defendant in error.)

*Collision between street car and wagon—Girl riding in wagon with father injured—Imputed negligence—Railroad liable.*

IN SAINT CLAIR STREET R'Y CO. *v.* EADIE, 43 Ohio St. 91 (1885), it appeared that "the plaintiff was a minor, aged sixteen years, and was fully capable of taking reasonable care of herself. She was lawfully riding with her father, who was driving his own wagon, when she was injured by a collision between the wagon and a street car, caused by the mutual and concurring negligence of a street-car driver and her father, but without any fault or negligence on her part. *Held*, that the negligence of her father was not to be imputed or attributed to her, and did not bar a recovery against the street-car company, whose negligence directly contributed to the injury. Covington Transfer Co. *v.* Kelly, 36 Ohio St. 86, 12 Am. Neg. Cas. 461, *ante*, followed and approved." Judgment for plaintiff below affirmed.

*Boy riding on rear of wagon killed in collision with street car—Imputed negligence.*

CINCINATI STREET R'Y CO. *v.* WRIGHT, ADM'R, 54 Ohio St. 181 (1896), boy about fourteen years of age, riding on rear of wagon, without knowledge or invitation of driver of wagon, killed in collision between wagon and street car; negligence of driver of wagon not imputable to deceased.

LOOKING AND LISTENING FOR APPROACHING TRAINS AT CROSSINGS—THE OHIO RULE.—In WHEELING & LAKE ERIE R. R. CO. *v.* SUHRWIAR, 22 Ohio C. C. 560, a recent case in the Ohio Circuit Courts (Sixth Circuit, Lucas county, September term, 1901), the rule as to duty of travelers approaching crossing is stated in the syllabus by the court (showing no requirement to stop as well as look and listen, and that rule of imputed negligence not applicable in Ohio), as follows:

"1. Under the rule in Ohio, a person in the full enjoyment of the faculties, before attempting to pass over a known railroad crossing, must look and listen for approaching trains, but it is not the rule of law in Ohio that one driving on a highway and approaching a railroad crossing should stop and look and listen. It may, however, be a question for the jury to determine whether under the particular circumstances of the case, ordinary care would require a person approaching a railroad crossing to stop as well as to look and listen for trains.

"2. The conduct of a person who, in crossing a railroad track in a wagon, finds himself before a railroad train, quickly approaching without giving any warning signals, must be considered in the light of the peril that he saw before him, of the state of mind that he must have been in, in view of the very few seconds of time that he had to determine what would be the best course to pursue; and if he exercised ordinary care under all the circumstances, he is not guilty of contributory negligence, although he may not, in fact, have done what was the very best thing to do at the time.

"3. Where a person is injured while riding on a wagon with another, who attempts to cross a railroad in the face of an approaching train, and is wrecked, the negligence of the driver cannot be imputed to such other person.

"4. A verdict for \$10,000 damages in a personal injury case, rendered at the re-trial of the case, while the verdict of the first trial, in which the judgment was reversed for error, was only for \$5,000, will not be set aside as excessive, where the first trial had taken place a few months only after the injury, while the second trial was two years later, after plaintiff's condition had fully developed and the result of his injury could be ascertained with practical certainty, and is of such a nature that the court, under the circumstances of the case, could not say that the verdict for \$10,000 was excessive."

A former judgment for plaintiff in the *SUHRWIAR* case, for \$5,000, was affirmed by the Circuit Court (see 20 Ohio C. C. 558), but was reversed by the Supreme Court.

*Collision at crossing.*

*PENNSYLVANIA CO. v. MOREL*, 40 Ohio St. 338 (1883); driving across track with loaded wagon and struck by train, which he knew was approaching; contributory negligence; judgment for plaintiff reversed.

*CLEVELAND, COL., CIN., ETC., R'Y CO. v. SCHNEIDER*, 45 Ohio St. 678 (1888); collision between train and wagon at crossing and driver of wagon killed; judgment for plaintiff for \$4,000 affirmed.

*Horse frightened — Obstruction at crossing.*

*PITTSBURGH, FORT WAYNE & CHICAGO R'Y CO. v. MAURER*, 21 Ohio St. 421 (1871); plaintiff's horse, which he was driving along highway, becoming frightened at obstruction at crossing and running away, causing wagon to be upset, and plaintiff to be injured; judgment for plaintiff reversed.



*Horse frightened by noise of train at railroad bridge.*

RAILWAY COMPANY *v.* JUMP, 50 Ohio St. 651 (1893); woman driving along highway injured by horse becoming frightened at noise of train at railroad bridge, and running away, causing buggy to be upset; judgment for plaintiff below affirmed.

*Walking on track and struck by train.*

RAILROAD CO. *v.* DEPEW, 40 Ohio St. 121 (1883); person walking on railroad track, struck by train; contributory negligence; judgment for plaintiff reversed.

*Attempt to rescue child on track.*

PENNSYLVANIA CO. *v.* LANGENDORF, 48 Ohio St. 316 (1891); person injured in attempting to rescue child who had fallen in front of an approaching train; judgment for plaintiff below affirmed.

*Person on sidewalk struck by horses of street car.*

IN PENDLETON STREET R. R. CO. *v.* SHIRES, 18 Ohio St. 255 (1868), action for personal injuries in being struck by horses attached to defendant's street car, which being unhitched to pass over excavation, got out of control of driver and ran against plaintiff, who was walking along sidewalk, judgment for plaintiff was reversed for erroneous instruction as to duty of defendant towards public. It was held that "while the employees of a street-railroad company are bound to the highest degree of care and prudence in the management of teams attached to their cars, with a view to secure the safety of their passenger, a different rule prevails in respect to members of the general public, between whom and the company no relation, arising out of contract, express or implied, exists. As to such persons, the employees of the company are only bound to exercise what amounts, under all the circumstances of the case, to ordinary care and prudence."

*Employee injured in collision.*

IN PITTSBURGH, CINCINNATI & ST. LOUIS RAILWAY CO. *v.* HENDERSON, 37 Ohio St. 549 (1882), employee injured in collision between construction train and freight train, judgment for plaintiff for \$3,000 was affirmed. The ruling is stated in the syllabus by the court, as follows:

"1. Where the superintendent of a railroad company has made an order as to the management of a particular train, which order will be reasonable or unreasonable, according to the circumstances under which it is to be enforced, the question whether in any particular case such order is to be deemed reasonable or unreasonable, is a

question of mixed law and fact, to be determined by the jury under proper instructions.

"2. Where an action is brought against a railroad company, by one of its employees, to recover damages for personal injuries, sustained by the enforcement of an order made by the superintendent of the company, as to the management of a particular train, which order was unreasonable, and the enforcement of the same was dangerous to such employee, the fact that the negligence of a fellow-servant of the injured person, while executing such order, contributed in producing the injury, affords no defense to the action."

*Animals killed or injured on track.*

In *BELLEFONTAINE & INDIANA R. R. Co. v. SCHRUYHART*, 10 Ohio St. 116 (1859), it was held that the operators of a railroad train have an unqualified right to carry a headlight upon the train at night, when necessary, for the safety of the lives and property embarked upon the train, and it is error to instruct a jury that such right depends upon its exercise, not endangering cattle that stray upon the track. Judgment for plaintiff reversed in action for damages for killing of stock that strayed upon railroad track at night.

*BELLEFONTAINE & INDIANA R. R. Co. v. BAILEY*, 11 Ohio St. 333 (1860), was an action for negligently killing plaintiff's horses, which were run over by train on defendant's track; judgment for plaintiff reversed.

*BELLEFONTAINE & INDIANA R. R. Co. v. FIFER*, 11 Ohio St. 339 (1860), was reversed upon the rulings in the *BAILEY* case, *supra*.

See also *Kerwhacker v. Cleveland, Col. & Cin. R. R. Co.* (1854), 3 Ohio St. 172 (cattle on track run over by train).

*Live stock killed on track—Statute—Pleading.*

In *MCCOOK ET AL. (RECEIVERS OF ATCHISON, TOPEKA & SANTA FE R. R. Co.) v. BRYAN*, 4 Okla. 488 (1896), action for damages for killing of plaintiff's live stock on track, judgment for plaintiff for \$363 was reversed, the syllabus stating the case as follows:

"1. There is no obligation in common law upon a railroad company to fence its track. It has the right to enjoy its right of way free from intrusion or trespass, like other occupants and owners of real estate, except as provided by statute.

"2. When the statute provides that when the owner of any tract of land, abutting upon a railroad shall construct a good and sufficient fence about such tract of land on all sides, except along the side abutting against such railroad; and when such owner of such tract of land shall have completed his portion of fence about such

proposed inclosure, he shall give notice of its completion to the railroad company upon whose line said tract is situated, and that if such railroad company shall neglect or refuse to comply with the requirements of the act, that such railroad company shall be liable for all damages accruing by reason of such neglect or refusal: It is *held*, that such railroad company is not liable for damages for the killing of stock by its locomotives, and upon its track, unless it is shown in the pleading and is also proven in the evidence, that the claimant for damages is an abutting owner, and that he has constructed his fence and given the notice required in the act, and that the railroad company has neglected to comply with the requirements of the statute.

"3. In this territory, an action for damages against a railroad company, for injuries sustained by cattle upon the right of way of such railroad company, is founded upon statute, and upon specific conditions, and the conditions must be shown in the pleading and appear in the evidence, in order to entitle plaintiff to recover."

See the Statutes of Oklahoma, 1893, §§ 1047-1049, relating to duty of constructing and maintaining fences.

*Collisions at crossings while driving across track.*

See SEVERY, ADM'R, *v.* CHICAGO, ROCK ISLAND & PACIFIC R'Y CO., 6 Okla. 153 (1897); person driving across track, struck and killed by train; judgment for defendant affirmed.

See also BOISE *v.* ATCHISON, TOPEKA & SANTA FE R'Y CO. (RECEIVERS OF), 6 Okla. 243 (1897); driving across track and struck by train; judgment for defendant reversed for erroneous admission of deposition of a witness.

DRIVING ACROSS TRACK — COLLISION AT CROSSING — CONTRIBUTORY NEGLIGENCE. — In *DURBIN v. OREGON RAILWAY & NAVIGATION CO.*, 17 Ore. 5 (1888), collision between train and team and wagon, which plaintiff was driving at crossing, one horse being killed and the wagon upset, judgment for plaintiff was reversed and nonsuit ordered to be entered, it being held that plaintiff was guilty of contributory negligence, as she was familiar with the crossing, had on other occasions looked for trains before driving across track, but at the time of accident drove across without stopping to look or listen.

*Collision at crossing.*

*MCBRIDE v. NORTHERN PACIFIC R. R. Co.*, 19 Ore. 64 (1890); collision between train and wagon at crossing; person driving killed; judgment for plaintiff affirmed.

*Collision at street crossing — Driving across track without looking.*

In *BLACKBURN v. SOUTHERN PACIFIC CO.*, 34 Ore. 215 (1898), it was held that where deceased, without stopping his vehicle for the purpose of looking for approaching trains, attempted to drive across a railroad track, in a city street, at a crossing with which he was familiar, and from which the view of the approaching train was obstructed, and was killed by a train while making such an attempt, a verdict should be directed for the railroad company, although the traveler was approaching the crossing at a slow walk, and the train was running at an unlawful rate of speed; that a failure to stop and listen before attempting to cross, under such circumstances, was negligence *per se*. The opinion in the *BLACKBURN* case, *supra*, reviews the leading cases upon this subject, and contains a clear statement of the law.

*Looking and listening at crossings — Rule in Oregon.*

It is the firmly established rule in Oregon "that the failure of a person about to cross a railway track on a highway, at grade, to look and listen for an approaching train, is negligence *per se*, and will bar a recovery for an injury received by a collision with a train at the crossing. *DURBIN v. OREGON R'Y & NAV. CO.*, 17 Ore. 5; *MCBRIDE v. NORTHERN PAC. R. R. CO.*, 19 Ore. 64."

**DEAF PERSON WALKING ON TRACK — CONTRIBUTORY NEGLIGENCE.** — In *COGSWELL, ADM'R, v. OREGON & CALIFORNIA R. R. CO.*, 6 Ore. 417 (1877), action for damages for injuries to plaintiff's intestate, who, while walking upon the track, was struck by defendant's engine and tender, judgment of nonsuit was affirmed, it being held that the deafness of the injured party was the proximate cause of the injury and he, being aware of this infirmity, was guilty of gross negligence in being on the track, as he was, walking laterally along it. It was also held that defendant's servants running the train had a right to suppose that a person so walking along the track would get out of the way of danger on signals being given.

**PERSON WALKING ON TRACK STRUCK BY TRAIN — CONTRIBUTORY NEGLIGENCE.** — In *BECK v. VANCOUVER R'Y CO.*, 25 Ore. 32 (1893), person walking along railroad track struck by train, running at rapid rate of speed, judgment for defendant was affirmed on the ground of plaintiff's contributory negligence. The following instruction was proper: "A man cannot go deliberately, and with his eyes open, into danger, and then complain of another that he is injured. It is his duty to use all the ordinary means

which men do use for their preservation, and if he fails to do that, if there is a choice of ways for him to pass, one a way of safety, and one a way of danger, and he is apprised of the situation in that regard, and takes the way attended with danger, he must abide the consequences of his hardihood." It was also held that the mere fact of running a train at rate of speed prohibited by ordinance is not, *per se*, conclusive proof of negligence, but is evidence of negligence to be considered with other evidence.

*Crossing track after alighting from street car — Contributory negligence.*

In *SMITH v. CITY RAILWAY CO.*, 29 Ore. 539 (1896), action for damages for injuries sustained by plaintiff who, having alighted from defendant's street car, walked around the rear end of the car and was struck and injured by a car on the other track, judgment for plaintiff was reversed on the ground of contributory negligence. Rehearing denied.

**CHILDREN INJURED ON RAILROAD TRACK.** — In *CASSIDA v. OREGON RAILWAY & NAVIGATION CO.*, 14 Ore. 551 (1887), action for damages for negligent killing of plaintiff's intestate, a child about seven years old, who was run over by defendant's train, the child having gone on the railroad trestle with two other children to escape cattle on the roadway, judgment for defendant was reversed, it being held error to reject evidence as to habit of persons to walk on the track, and that evidence as to reason of children going on track was admissible to rebut defense of contributory negligence.

In *WARD v. SOUTHERN PACIFIC CO.*, 25 Ore. 433 (1894), action for damages for negligent killing of plaintiff's son, about six years of age, who was found dead on track, the complaint alleging that he was run over and killed by defendant's train, judgment for plaintiff was reversed, it being held that the deceased was a trespasser upon the track, to whom the railroad company owed no duty, except not to wantonly inflict injury upon him; and that the finding of the child's body on the track raised no presumption of negligence on the part of the railroad company.

*Children run over by street cars.*

*HEDIN v. SUBURBAN R'Y CO.*, 26 Ore. 155 (1894); child, about three years old, playing in care of elder brother, running across street-car track to her mother, run over by street car; judgment for plaintiff affirmed.

*WALLACE v. SUBURBAN R'Y CO.*, 26 Ore. 174 (1894); child, about

six years old, run over and killed by street car, as she was crossing track at street crossing; judgment for plaintiff affirmed.

*Animals injured or killed on track.*

See *HINDMAN v. OREGON R'Y & NAV. CO.*, 17 Ore. 614; *SULLIVAN v. OREGON R'Y & NAV. CO.*, 19 Ore. 374; *EATON v. OREGON R'Y & NAV. CO.*, 19 Ore. 393; *MEEKER v. NORTHERN PAC. R. R. CO.*, 21 Ore. 523; *MOSES v. SOUTHERN PAC. R. R. CO.*, 18 Ore. 385; *KEENEY v. OREGON R'Y & NAV. CO.*, 19 Ore. 294.

## NORTH PENNSYLVANIA RAILROAD COMPANY v. MAHONEY.

*Supreme Court, Pennsylvania, February, 1868.*

(Reported in 57 Pa. St. [7 P. F. Smith], 187.)

**IMPUTED NEGLIGENCE.** — To a child of tender years (in this case about four years of age), no contributory negligence can be imputed (1).

**JOINT TORT-FEASORS.** — A plaintiff is not precluded from recovery against one joint tort-feasor, by showing that others have borne a share in it.

**TORT-FEASORS — ELECTION — CONTRIBUTION.** — All torts by several persons are joint or several at the election of the injured party, though but one satisfaction can be recovered, and there is no contribution among tort-feasors.

**PERSON ATTEMPTING TO PROTECT CHILD FROM DANGER — CHILD RUN OVER BY TRAIN — TRESPASS.** — Where a woman, not in care of a child, but with the best intentions and with a view of removing it out of danger, attempted to cross the track in front of a moving car, with the child in her arms, tripped and fell, which threw the child under the wheels of the car, causing it to lose an arm, and resulting in the death of the woman herself, it was held that an action would lie against the woman for injuries to the child.

**PROXIMATE CAUSE.** — But in such case it was held that the negligence of the person so attempting to protect the child from danger, was not the proximate cause of the accident, and the railroad company was liable for its negligent running of the train.

ERROR to the District Court of Philadelphia: No. 195, to July Term, 1867. *Judgment for \$2,500 affirmed.*

"This was an action on the case at the suit of Ellen Mahoney, by her next friend, John Mahoney, against the North Pennsylvania Railroad Company; the writ was issued to June Term, 1865, of the District Court. The action was for negligence by the defendants in running over the plaintiff with a tender of their engine.

1. See NOTE ON IMPUTED NEGLIGENCE, in 11 AM. NEG. CAS. 151-156.

"On the trial, the evidence was, that about one o'clock in the afternoon, the plaintiff, who was about four years of age, and another child, who was the child of a Mrs. Farr, were playing on the west side of American street, on which are the defendant's railroad tracks, near Oxford street. Mrs. Farr was the aunt of the plaintiff. She heard the engine bell ringing, and when she saw the children, she called to them to stay where they were for fear of the locomotive. When they heard her calling the children, both came running towards her over towards the east side of the street. Mrs. Farr went and met them and got them on to the west side, on or near the pavement, where she let them go and slapped her own child. She then saw that the plaintiff had run towards the east side, and was between the two tracks. Mrs. Farr ran after the plaintiff, caught her and turned, with the plaintiff under her arm, to go to the west side. She met her own child, who avoided her, and crossed safely to the east; she reached for her child, her feet caught in the west rail of the east track, she was truck by the tender of the engine, which came from the north with the tender foremost. The tender passed over the child's arm and seriously injured it, and also hurt Mrs. Farr so badly that she died shortly afterwards. When Mrs. Farr attempted to cross the track, the tender was but a few feet from her.

"There was evidence for the plaintiff that there was no guard on the tender; that wood was piled so high on it that the engineer and fireman could not see over it; that the engineer and fireman were in the engine-house, looking from a little window in it; that they could not see immediately before the tender at all, but by putting their heads out of the window, could see to a distance of forty or fifty feet before the tender; that the accident could have been avoided if they had been looking; that it was unusual for a tender in that street to be before the engine; that the engine was going very rapidly; that it was a thickly-settled neighborhood, in the vicinity of a number of schools, with other facts tending to establish negligence.

"The defendants gave evidence that the engine was moving very slowly, with the bell ringing; that the engineer and fireman were watching the track with proper care, and other facts tending to disprove negligence.

"The defendants submitted the following points:

"1. An attempt of a foot passenger to cross a railroad track,

after notice of an approaching locomotive, constitutes negligence on the part of such foot passenger, and the railroad company is not liable for any accident which may occur to the foot passenger under such circumstances.

"2. Where a child is under the charge and control of a grown person at the time of attempting to cross a railroad track, and an accident occurs to the child, the child cannot recover damages, if the negligence of the person in charge of it contributed to produce the accident.

"3. If the jury believe that the plaintiff's aunt, who was in charge of her, could, by the exercise of reasonable care, have avoided the accident, the defendants are not liable in this suit.

"4. The presence of the defendant's railway track was of itself a warning to the plaintiff and the person who had her in charge, of danger in crossing the same, and in the absence of evidence of the exercise of reasonable care on the part of Mrs. Farr in crossing the track, the verdict of the jury must be for the defendants.

"5. Under the evidence, the accident was caused by the negligence of the plaintiff's aunt, in attempting to cross defendant's track with the plaintiff in her arms, after notice of an approaching locomotive, and the plaintiff cannot recover in this suit.

"6. There is no sufficient and legal evidence on the part of the plaintiff that Mrs. Farr, who was in charge of the child, had exercised due care on her part, in crossing defendant's track, and, therefore, the plaintiff is not entitled to recover.

"7. There is no sufficient evidence of negligence on the part of the defendants to entitle the plaintiff to recover in this suit.

"The judge below declined to charge as requested by the defendants, and reserved all the points. The jury found a verdict for the plaintiff for \$2,500.

"Judgment was afterwards entered for the plaintiff on the points reserved; the opinion of the court having been delivered by SHARSWOOD, P. J.:

"We think there was evidence of neglect in the servants of the defendants sufficient to justify the verdict. It is not necessary here to say whether a mere scintilla is enough. On that point, the finding of the jury is approved by the judge before whom the trial was had.

"The question then reserved is simply this, assuming negligence on the part of the defendants, whether the negligence of a person who, without express authority from the parents, but as



an act of kindness, takes charge of an infant child, contributing to the injury, is any defense in an action by the child? In this instance, the unfortunate woman who laid hold of the child, to carry it across the track of the railroad, and who lost her own life in the attempt, was the aunt of the plaintiff. The plaintiff did not reside with the aunt, and no evidence was offered to show any authority in her. If, however, this was an action by the father to recover damages, for the death of the child, a very different question would be presented. It would most probably be held that it was negligence to suffer such an infant to be on the streets without a caretaker, and he could not hold the defendants responsible, whether he had appointed a caretaker, who was negligent, or left the child to roam at large without one. To a child of plaintiff's years no contributory negligence can be imputed. Neither is the plaintiff precluded from recovery against one joint tort-feasor by showing that others have borne a share in it. All torts by several persons are joint or several at the election of the injured party, though but one satisfaction can be recovered, and there is no contribution among tort-feasors. Hence springs the right of a plaintiff, who has recovered several verdicts against different defendants, to elect *de melioribus damnis*. There is nothing in the case to show that plaintiff could not have included her aunt as defendant with the company or their officers, or maintained a separate action against her. How then can she be barred from this action? The English case cited and relied on by the counsel of defendants, *Waite v. N. E. R'y Co.*, 5 Jur., Pt. 1, 1859, p. 936 (1), was the case of the negligence of the person in charge of a child, who had taken and paid for his passage with defendants, a railroad company, and while waiting in the depot to get on board, the child was injured by the approach of another train, of which the defendants had given no notice. The defendants might well have said, we would not

1. In *WAITE v. NORTHEASTERN R'y Co.*, 5 Jurist, N. S., 936 (Exchequer Chamber, 1859), it appeared that plaintiff, a child five years old, was in the care of his grandmother, at a station of defendant's railway. For the purpose of going by it to T., she purchased a ticket for herself and one for the child. In crossing the track, to be ready for the train, they were knocked down by a freight train. The jury

found that there was negligence in the servants of the defendants and in the grandmother. Held, that the plaintiff was so identified with his grandmother, that, by reason of her negligence, an action in his name could not be maintained against defendants. [This was an appeal from rule absolute entering a nonsuit made by the Court of Queen's Bench. See 4 Jurist, N. S., 1300.]

have received the child as a passenger without a caretaker, or, if we had, we would have put him in charge of a servant, or in a place where no harm could come to him till the train was ready to start. The decisions of the New York and Massachusetts courts are certainly entitled to very high respect, but they are not authority binding upon us, and the precise point was not made or met in those cases: *Hartfield v. Roper*, 21 Wend. 615 (1); *Holly v. Boston Gas Co.*, 8 Gray, 123. In this decision, we think that we are fully sustained by the opinion of our own Supreme Court in *Smith v. O'Connor*, 12 Wright, 218 (2).

"Rule discharged, and judgment for plaintiff on points reversed.

"The defendants took a writ of error, and assigned for error the refusal of the court to affirm their points and entering judgment on the reserved points."

W. R. WISTER and M. P. HENRY, for plaintiffs in error.

P. ARCHER and T. GREENBANK (with whom was L. C. CASSIDY), for defendants in error.

**Sharswood, J.** — This judgment is affirmed on the grounds stated in the opinion of the District Court on the motion for a new trial. But as some views have been urged here which were not presented below, it is proper that they should not be passed without notice.

It has been strenuously contended that Mrs. Farr, whose negligence, resulting, no doubt, from want of presence of mind, contributed to the injury, was not a trespasser or tort-feasor. The evidence showed that the child was not under her care, but that with the best intentions, and with the design to remove it out of the reach of danger, she attempted to cross the track of the railroad, a few yards in front of the moving car, with the child in her arms, tripped and fell, which threw it under the wheel and caused the loss of its arm, and the death of the unfortunate

1. See *HARTFIELD v. ROPER*, 21 Wend. (N. Y.) 615, reported in this volume, page 293, *ante*, together with note appended to same. was held that "the rule of law as to mutual negligence between adult plaintiffs and defendants does not apply to the case of a child of tender years, who is to be held only to the

2. In *SMITH v. O'CONNOR*, 12 Wright (48 Pa. St.) 218 (1864), action against Smith for negligently running over the plaintiff, a girl about seven years old, while she was crossing the street, it exercise of that degree of care and discretion, ordinarily to be expected from children of that age," and judgment for plaintiff was affirmed.

woman herself. It is supposed that as her intention was not to injure, but to benefit the child, no action would lie against her. The law is clearly not so. An action can be maintained without regard to the motive, though no jury in such a case would give more than nominal damages. Nothing but necessity, or inevitable accident, excuses a trespass. In a case where the defendant was uncocking a gun, and the plaintiff, standing by to see it, it went off and wounded him, it was held that he might maintain trespass. *Underwood v. Hewson*, 1 Strange, 596 (1). No man shall be excused of a trespass, except it may be judged utterly without his fault; as if a man by force take my hand and strike another, or if the defendant should plead that the plaintiff ran across his piece when it was in the act of discharging, or set forth the case with the circumstances so as to make it appear that it had been inevitable, and that he had been guilty of no negligence to give occasion to the hurt. *Weaver v. Ward*, Hob. 134 (2). If one of two persons fighting, unintentionally strikes a third, the absence of intention can only be urged in mitigation. *James v. Campbell*, 5 C. & P. 372 (3). If one does an injury by unavoidable accident, an action does not lie; it is otherwise if any blame is imputable to him, though he be innocent of an intention to injure. *Wakeman v. Robinson*, 1 Bing. 213 (4). The very

1. In *UNDERWOOD v. HEWSON*, 1 Strange, 596, where defendant was uncocking a gun and the plaintiff standing to see it the gun went off and wounded him, it was held that plaintiff might maintain action, as trespass lies for an accidental hurt.

4. In *WAKEMAN v. ROBINSON*, 1 Bing. 213 (1823), it was held, that if one does an injury by unavoidable accident, an action does not lie; *aliter* if any blame attaches to him, though he be innocent of any intention to injure, as, if he drive a horse, too spirited, or pull the wrong rein, or use imperfect harness and the horse taking fright, kills another horse. In such a case the court refused to grant a new trial, though the judge who presided, after summing up, told the jury that the defendant was liable, even though the accident was unavoidable, and no blame was imputable to him; omitting to direct the jury to consider whether the accident was unavoidable or occasioned by any fault in the defendant.

2. In *WEAVER v. WARD*, Hobart's Rep. 134, it was held, that if one trained soldier wounded another, in skirmishing for exercise, an action of trespass will lie, unless it shall appear, from the defendant's plea, that he was guilty of no negligence and that the injury was inevitable.

3. In *JAMES v. CAMPBELL*, 5 Car. & P. 372 (1832), assault and battery, it was held, that if one of two persons fighting unintentionally strikes a third person, he is answerable in an action for an assault, and the absence of in-

tention can only be urged in mitigation of damages.

4. In *WAKEMAN v. ROBINSON*, 1 Bing. 213 (1823), it was held, that if one does an injury by unavoidable accident, an action does not lie; *aliter* if any blame attaches to him, though he be innocent of any intention to injure, as, if he drive a horse, too spirited, or pull the wrong rein, or use imperfect harness and the horse taking fright, kills another horse. In such a case the court refused to grant a new trial, though the judge who presided, after summing up, told the jury that the defendant was liable, even though the accident was unavoidable, and no blame was imputable to him; omitting to direct the jury to consider whether the accident was unavoidable or occasioned by any fault in the defendant.

foundation of the defense relied on by the plaintiffs in error was, that there was blame imputable to Mrs. Farr; that she was guilty of negligence which had contributed to produce the injury.

It has been urged, however, that if Mrs. Farr was a tort-feasor, then the only remedy of the defendant in error was against her, on the principle of *Lockhart v. Lichtenthaler*, 10 Wright, 151 (1). It was decided in that case, that where a passenger is injured by a collision resulting from the concurrent negligence of those in charge of the train, in which he was, and of another party, the carrier alone is liable. If the defendant in error had been in custody of a nurse or other person, to whose care she had been intrusted, by her parents or guardian, there would be great force in this position. But there was no evidence of this. The mere relationship was not enough; nor did it appear that the parents had been accustomed to intrust the child to the care of the aunt. This, then, is like the case of a person who has been placed against his own will in a railroad car and receives an injury by the concurrent negligence of the carrier and of another party. The doctrine of *Lockhart v. Lichtenthaler* does not apply, as the reasoning of the present chief justice in the opinion, and the authorities cited by him, clearly show.

It was suggested also on the argument here, with great ingenu-

1. In *LOCKHART ET AL. v. LICHTENTHALER ET AL.* 10 Wright (46 Pa. St.), 151 (1863), where judgment for plaintiffs was reversed, the syllabus states the case as follows:

"1. Where a passenger on a carrier vehicle is injured by a collision, resulting from the mutual negligence of those in charge of it, and of another party, the carrier must answer for the injury.

"2. But if the negligence of the carrier did not *directly* contribute to the accident, though there may have been negligence in a *general sense*, the other party will be answerable, if the act of his servants or agents was the *proximate* cause of the disaster.

"3. In an action by the widow and children of an employee of a firm who, when in charge of their coal cars, drawn by an engine of a railroad company and upon their track, was killed,

in consequence of a collision with oil barrels of the defendants, placed too near the rail, it was held competent for the defendants to prove by experts the rate of speed at which the cars were running at the time of the accident, that this speed, in connection with the bad condition of the track, at the place, was dangerous, and that the train of cars was improperly made up, etc.; but the evidence, to be effectual, must tend to show the actual concurring negligence on the part of those in charge of the train.

"4. Whether the defense of concurring negligence in the agencies producing death, if a defense at all, can be heard without being specially pleaded, *query*.

"5. English and American cases on mutual negligence of colliding vehicles, discussed and distinguished."

ity and commendable zeal, that though there may have been negligence in the plaintiffs in a general sense, it did not directly contribute to the injury, the proximate cause of which was the heedless conduct of the aunt. But if this was a case to which the maxim, *causa proxima non remota spectatur* applied, it is very evident that the proximate cause was the motion of the train, and the negligence of the aunt the remote cause. But in truth, the negligence of the plaintiffs was not mere negligence in a general sense, but contributed directly to produce the injury. That there was evidence of such negligence, not a mere scintilla, but sufficient to go to the jury, cannot reasonably be questioned. The train was backing in a public street of a closely built part of the city, at all times a dangerous operation, and requiring the exercise of great caution; the servants of the plaintiff were not on the lookout, but were in such a position that they could not see any considerable distance in the direction of the motion; and there was contradictory evidence as to the rate of speed. The court below was right in submitting the cause to the jury, and the other errors assigned not having been sustained, the judgment must be affirmed.

Judgment affirmed.

## FLOWER v. PENNSYLVANIA RAILROAD COMPANY.

*Supreme Court, Pennsylvania, January, 1872.*

(Reported in 69 Pa. St. 210.)

CHILD BOARDING ENGINE TENDER AT REQUEST OF FIREMAN, RUN OVER AND KILLED — COLLISION — SCOPE OF EMPLOYMENT — RAILROAD COMPANY NOT LIABLE. — In an action to recover damages for the death of plaintiff's intestate, a boy about ten years old, who, while climbing on the tender of an engine, at a water station, to fix the hose for the purpose of turning on water for the engine, which he did at the request of defendant's fireman, was thrown from the tender by reason of the remainder of the train striking the tender, as it came down the track, and was run over and killed, it was held, that the railroad company was not liable, it not being within the scope of the fireman's employment to request the child to board the tender and assist him in his duties.

TRESPASSER. — The act of the boy, in climbing upon the tender, at the request of the fireman to perform the fireman's duties, did not bring the boy within the protection of the railroad company.

MASTER AND SERVANT. — Even viewing the boy as an employee, at the request of the fireman, the relation itself would destroy his right of action. *Distinguishing Kay v. Penn. R. R. Co.*, 15 P. F. Smith, 269 (1).

ERROR to the Court of Common Pleas of Lebanon County: No. 57, to May Term, 1871. *Judgment for defendants reversed.*

1. *The Kay case—Child run over and killed on track—Railroad liable.* — In *KAY v. PENNSYLVANIA R. R. CO.*, 15 P. F. Smith (65 Pa. St.) 269 (1870), action for damages for injuries to child nineteen months old, who was run over and arms injured by defendant's train, the facts as stated in the opinion by Agnew, J., were as follows: "In giving judgment for the defendants *non obstante veredicto*, the learned judge took the question of negligence away from the jury. He did this by deciding that the railroad company was in the lawful use of its track, and that the plaintiff was a trespasser. This left out of view two aspects of the case to be found in the evidence, the public use of the ground permitted by the company, and the manner of the accident. The ground was a large open lot, traversed by railroad sidings and a canal basin. It was leased by the defendants from another railroad company, which used it for the purpose of piling and loading lumber; the railroad tracks and canal basin being nearly parallel and in close proximity. The lot lay in Williamsport, adjacent to large saw mills, where an immense lumber business is done. In consequence of this business, teams were crossing the lot, and hands engaged in hauling the lumber, and the public were permitted to pass to and fro upon it, and along the track, where the accident happened, a well-worn footpath was plainly visible. Children were often to be found there. The siding upon which the plaintiff was injured left the main lumber track and followed the bend of the canal basin, curving considerably at this point. The plaintiff, a child but nineteen

months old, lived with her parents in a small shanty, on this lot, occupied without objection by the railroad company, and lying between the main track and siding, at about 142 feet from the place of the accident. The injury took place about eight o'clock in the morning of a summer day, and was caused by detaching a lumber car, propelled in advance of the engine, and sending it around the curve in the siding, on a slight down grade, unattended by a brakeman. After running over the child, the car was carried by its own momentum about 170 feet beyond the place of injury. At the point on the main track, where the car was detached from the engine to run through the opened switch out upon the siding, the siding where the child was injured, was not visible to the engineer or conductor on the engine, in consequence of the curvature of the track along the canal basin, and of intervening piles of lumber. The parents of the child were poor, and the mother was employed that morning in washing for herself and others. She had gone out over the track to the canal for water, carrying the child on her arm and the bucket in her other hand. Returning she set the child down before a chair with some sugar placed upon it, and engaged again in washing. In three or four minutes she missed the child, which had passed out unobserved. She ran out, called the child, ran around the house, and met the conductor carrying the child in his arms. Both of its arms were crushed and had to be amputated. This is a concise statement of the case on the part of the plaintiff." \* \* \* In discussing the numerous points in

"This was an action on the case, commenced May 9, 1868, in the Court of Common Pleas of Lancaster county, by John M. Flower and wife against the Pennsylvania Railroad Company, to recover damages for the death of the plaintiff's son, Phares Flower, a child about ten years old, occasioned, as they alleged, by the negligence of the defendants' servants. On August 31, 1869, the cause was removed by the defendants to the Court of Common Pleas of Lebanon county, where it was tried November 16, 1870, before PEARSON, P. J.

"The undisputed facts appeared to be the following: The plaintiffs lived in the city of Lancaster, the father, a shoemaker, occupying a shop on the line of the defendants' track, about half-way between James and Lemon streets, the distance between them being about 600 feet, and opposite a water station of the defendants; a door from his shop opening on the platform of the station, which is an excavation about six feet deep. About eight or nine o'clock in the morning of May 2, 1868, the son went on the platform; whilst there an engine and tender, with one car of the defendants under the charge of the fireman only, came up to the station for the purpose of taking water. While the engine was standing, the boy was climbing on the tender, and at the

the case the court, in the course of its opinion, said: "In the present case the railroad company, for the benefit of trade, resulting to its own profit, built its tracks along the canal basin, and left its lot open for the convenient access of the public, in the handling of lumber, and transferring it to the cars upon its tracks. And the lot being thus open to all engaged in that business, it also suffered its tracks to be used by the neighboring population as a way across the lot from one part of the city to another. As a consequence, people passed and repassed upon the tracks, and the company and its servants would be led to expect to find them there at nearly all hours of the day. It is not like those portions of the road used solely for the passage of the trains, where the company would have not only a right to demand, but reason to expect a clear track. But the presumption of a clear

track at this place could not reasonably arise if the circumstances were such as have been stated. A greater precaution against injury to those thus permitted to use the lot and the tracks of the company became a duty." \* \* \* The court held that the act of defendant's servants in detaching a car and letting it run down grade without a brakeman at the place of accident, was negligence. Continuing, the court said: "Where the injury is caused by actual negligence, the incapacity of a child of this [plaintiff's] age to know the danger and to avoid it, shields it from responsibility for its acts." \* \* \* In such a case, negligence of parent was not imputable to child. Judgment for defendants reversed. [The court cited numerous authorities as to contributory negligence of infants, which cases will be found reported with the Pennsylvania cases, in this volume of AM. NEG. CAS.]

moment, some detached cars from above struck the car attached to the tender; the shock caused the boy to fall; he was run over and killed.

"The evidence of the plaintiffs was from several witnesses. The father testified that he heard some one ask the boy to put on the hose and turn on the water; just after that he heard a noise, went out and found his son with his neck under a wheel, killed.

"George Babel, a boy about thirteen years old, testified that he was standing on the water station, and heard the fireman tell the boy to put the water into the tank; whilst the boy was getting over the tender to do so, a car ran down the track, jarred the engine and threw the boy off, the car went over him and killed him. This witness and the deceased were the only persons on the platform.

"For the defendants: The fireman denied that he had asked the deceased to put water into the engine; he testified that he had no power to ask anyone to do it; if he had, he would have violated his duty.

"The conductor testified that he had cut the engine and car, it ran down to get water; he ran the other cars to the water station to couple them; he got on to the foremost car, and in attempting to apply the brake, the chain broke; he went on to the other car for the same purpose, but before he reached the brake on that, the cars came together and the accident occurred; his cars came down at about the rate of three miles an hour.

"Black, the foreman of engines, testified that he selected the engineers from the firemen; engineers are not permitted to carry anyone but the conductors and witness; it is the duty of firemen to supply the engines with water, and they have no power to invite another to put it on; in the absence of the engineer, the fireman acts as engineer for the time being; they have printed instructions to that effect.

"The engineer of the train testified that as he was coming through Lancaster with his train, he was necessitated to leave it, and told the fireman to run to the station and take in water.

"The place where the station was, was used exclusively for the passage of trains; the water station was on a piece of ground held by the company under a long lease; it was not at any public crossing.

"The plaintiff's first point was:

"If the jury believe that plaintiff's minor son was induced by



the defendant's agent, engaged in his proper employment upon a place of danger, such agent at the time neglecting his own duty, and imposing it upon said minor, and the said minor was there killed by the negligence of said agent, or other agents of the company, plaintiffs are entitled to recover.'

"To this point the court answered:

" 'This point is negatived, as it applies to the facts of the present case, as the person who invited the deceased on the engine or tank had no authority in law so to do, and, therefore, as relates to the defendants the deceased was a trespasser in getting on the engine or tank — was there without authority.'

"The court, after referring to the evidence, charged:

" '\* \* \* On this contradictory evidence, it would be left to the jury to determine the disputed facts, and whether there was or was not negligence on the part of the company's servants, which caused the death of this boy, provided the case turned on that question, which, in our opinion, it does not, but whether he was on the engine by lawful authority or as a mere intruder and trespasser.

" 'If the person injured is on the train as a mere trespasser, without authority from anyone having power to give it, he cannot recover damages, unless injured intentionally or through very gross negligence, and even then probably not from the company, but from the person causing the damage. The same rule prevails where parents sue for the loss of service of the child. If a person is invited on the train by some employee of the company, not having the superior control in that department of the company's business, but is at the time out of the range of his employment, and the person invited is injured whilst so on the train, the company is not liable. The injured person is a mere trespasser. The principal may be always considered present when the servant acts within the general scope of his employment. If he travels entirely out of it the principal cannot be affected. \* \* \*

" 'Where by the rules of the company, the engineer and fireman are prohibited from taking anyone on the engine, except the conductor of the train, or the agent having general control of that branch of the company's business, and the servant (engineer or fireman) permits a man to ride, or invites him on the engine, it is out of the usual course of the servant's employment, and if the person so invited is injured through carelessness, the company is not responsible. The party is there without authority,

for it is not the general business of the engineer or fireman to carry passengers, therefore, no one can be misled by their situation on the train, nor have they any right, as against the company, to suppose that the engineer or fireman had authority to invite them on the engine or train. The person inviting would be answerable in damages, but not the company. It is precisely the same in law as if men or boys should climb on the cars without invitation or request from anyone. Both men and boys are in the practice of intruding on the track of the road, and getting on the cars without justification or excuse, and the company is not responsible in such cases unless for intentional injury by their employees, or for very gross carelessness. \* \* \* The engineer had no authority, by virtue of his office, to invite this boy or any other outsider on his engine. This particular act was prohibited, and it was entirely beyond the general scope of his employment; therefore, if he did say to the boy, "Put on the hose and turn on the water," it was no lawful authority for the boy to get on the engine. So far as it affects the railroad company, it is the same as if the boy had volunteered to do the act, or climbed on the tender without request from any one. \* \* \*

"The verdict was for the defendants. The plaintiffs took a writ of error, and assigned for error the answer to their first point and the charge of the court."

A. C. REINOEHL and O. J. DICKEY, for plaintiffs in error.

H. M. NORTH and L. W. HALL (G. F. BRENNEMAN, with them), for defendants in error.

**Agnew, J.** — It is proper this case should be examined in the light of the evidence of the plaintiffs. According to that view the engine, tender and one freight car ran down to the water tank to take in water. They were in charge of the fireman, the engineer having necessarily stopped off till their return. At the water station, the fireman in charge asked the son of the plaintiffs, a boy ten and a half years old, standing on the platform of the water tank, to put in the hose and turn on the water; and then turned to clean out the ash pan of the engine. The boy climbed up the side of the tender to put in the hose, and as he did, some detached freight cars, belonging to the train, came down without a brakeman, and struck the car behind the tender, driving the tender and engine forward from six to ten feet. The boy fell from the tender and was crushed to death. Is the railroad company responsible to the parents? The case involves

no public right. The accident happened at no crossing, or place where the public had a right to be. The boy was not a passenger, or one to whom the company owed a special duty. The platform of the water tank was the private property of the company, and was used for its own purposes. The engine and tender were where they had a right to be. The track itself was the property of the company, and the detached cars were not the cause of injury in any sense which affected the public rights or even those of the employees of the company. They came against the car and tender with no great force, and did no injury to the property or employees of the company. They were the cause of injury to the boy, only in so much that he had placed himself in a position of danger, where ordinarily he had no right to be. It is evident, therefore, that the case turns wholly on the effect of the request of the fireman, who was temporary engineer, to put in the hose and turn on the water. Did that request involve the company in the consequences? This is a very hard case. A willing, bright boy, not arrived at years of discretion, has lost his life in simply trying to oblige the fireman. But we must not suffer our sympathies to do injustice to others by overriding those fixed principles which underlie the rights of all men, and are essential to justice. It is natural justice that one man should not be held liable for the act of another, without his participation, his priority, or his authority. It is clear that the fireman, through his indolence, or haste, was the cause of the boy's loss of life. Unless his act can be legally attributable to the company, it is equally clear the company was not the cause of the injury. The maxim, *qui facit per alium facit per se*, can apply only where there is an authority, either general or special. It is not pretended there was a special authority. Was there a general authority which would comprehend the fireman's request to the boy to fill the engine tank with water? This seems to be equally plain without resorting to the evidence given, that engineers are not permitted to receive any one on the engine, but the conductor, and the foreman or superintendent; that it is the duty of the fireman to supply the engine with water; that he has no power to invite others to do it, and can leave his post only on a necessity. The business of an engineer requires skill and constant attention and watchfulness; and that of a fireman requires some skill and much attention. They are in charge of a machine of vast power, and large capacity for mischief. The responsibility

resting on them, and especially on the engineer, is great, and neither should be permitted to delegate the performance of his duties to others. In doing so without permission they transcend their powers. There cannot, therefore, be any general authority in the engineer and fireman which can embrace a request to perform the fireman's duty. Even an adult, to whom no injury would be likely to ensue, could not justify under the fireman's request. Much less can there be any presumption of authority to invite a boy of tender years to perform a service which required him to clamber up the side of the engine or tender. It was a wrong on the part of the fireman to ask such a youth to do it. Whether the boy could be treated as a mere trespasser is scarcely the question. His youth might possibly excuse concurrent negligence where there is clear negligence on the part of the company. Such were the cases of *Lynch v. Nurdin*, 1 Q. B. 29 (1), 41 Eng. C. L. 422; *Rauch v. Lloyd & Hill*, 7 Casey, 358; *Smith v. O'Connor*, 12 Wright, 218. See also *Railroad Co. v. Spearen*, 11 Wright, 300, and *Oakland R'y Co. v. Fielding*, 12 Wright, 320 (2). The true point of this case is, that in climbing the

1. In *LYNCH v. NURDIN*, 1 Q. B. 29, it was held that the rule of law, that a plaintiff who has contributed to an injury occasioned by the negligence of the defendant, cannot recover a compensation in damages, does not apply where the plaintiff is a person incapable of exercising ordinary care and caution. Where, therefore, the defendant's servant left a horse and cart unattended in a public street, and a child under seven years of age, during his absence, climbed on the wheel, and other children urged forward the horse, whereby he was thrown to the ground, and the wheel fractured his leg, it was held that the jury was justified in finding a verdict for him, if of opinion that there was negligence on the part of the servant. Held, also, that the co-operation of third parties in the injury was not a ground of defense, if the means of injury were negligently left where it was extremely probable that they would be set in motion.

As to the rule of law relating to contributory negligence of children, see

also *Lygo v. Newbold*, 9 Exch. 302, similar ruling as in *Lynch v. Nurdin*, *supra*.

2. In *RAUCH v. LLOYD & HILL*, 7 Casey (31 Pa. St.), 358 (1858), child between six and seven years of age run over and legs and feet injured while attempting to crawl under cars which blocked public crossing, judgment for defendants was reversed, the syllabus stating the case as follows:

"The conductor of a train of railroad cars, on a railroad belonging to the State, has a right to direct all the movements of the train, and the engineers and teamsters employed, whether the motive power be furnished by the Commonwealth or not, are regarded as agencies employed by him, and are under his control.

"For an injury resulting to a third person, through the negligence of any of the agencies employed in the moving or management of the cars, the conductor and his employers are responsible.

side of the tender or engine, at the request of the fireman, to perform the fireman's duty, the son of the plaintiff did not come within the protection of the company. To recover, the company must have come under a duty to him, which made his protection necessary. Viewing him as an employee, at the request of the fireman,

"Where the conductor permitted the train to stand on the crossing of a public street, and absented himself from it, and the teamster attached the horses to it and moved it, from which the injury ensued, it was as much the act of the conductor and his employers as if he had been present and directed it to be done.

"In such a case the doctrine of *remote* and *proximate* causes concerned in causing the injury does not arise and has no application.

"The rules prescribed by the canal commissioners, the general railroad law and public policy, are alike opposed to transporters so using railroads as to obstruct public highways and streets.

"It is error for the court below to submit to the jury whether an obstruction of a public street was inevitable, where the evidence showed that it could have been avoided by the exercise of proper care and diligence on the part of the conductor. It is the duty of the court, in such case, to instruct the jury, as matter of law, that such obstruction is unauthorized and illegal.

"Where a child of tender years attempted to pass under a train of railroad cars negligently left standing on the crossing of a public street, by which he was injured, the owners of the cars are liable.

"A child is not to be judged by the same rules as an adult, and cannot be regarded as guilty of negligence for attempting to pass under a car left standing across a street where he had a right to pass."

See note of *Smith v. O'Connor*, 12 Wright, 218, on page 521, *ante*.

In *PHILADELPHIA & READING R. R. Co. v. SPEAREN*, 11 Wright (47 Pa. St.) 300 (1864), it appeared that a girl five years old, returning from school, instead of going to proper crossing of the railroad, went down track below crossing and was struck by an engine while trying to cross track. There was judgment for plaintiffs, which, on appeal, was reversed. The syllabus states the points as follows: "(1) The rules which regulate the distance at which trains shall run from each other on a railroad are intended solely for the protection of the property of the company, and the safety of their employees and passengers, and not for persons who may be traveling along the highway; and no inference of negligence can be drawn from the proximity of trains, in an action to recover damages for an injury done to a person while crossing the railroad track, at a place not known or used as a public crossing. (2) Where a child about five years of age, in attempting to run across a railroad track between a coal train and an engine and tender, which was following close behind it, was struck and injured, it was held that the company were not answerable in damages without proof of ordinary care in the engineer at the time when, and the place where, the injury was done." \* \* \* "There is no absolute rule as to what constitutes negligence; \* \* \* nor will the same rule apply to adults and to children." It is a question of fact.

In *OAKLAND R'Y Co. v. FIELDING*, 12 Wright (48 Pa. St.) 320 (1864), boy, between sixteen and seventeen years of age, falling into hole on track and run over by engine, judgment for plaintiff

the relation itself would destroy his right of action. *Caldwell v. Brown*, 3 P. F. Smith, 453; *Weger v. Penn. R. R. Co.*, 5 P. F. Smith, 460; *C. V. R. R. Co. v. Myers*, 5 P. F. Smith, 288 (1). Had the fireman himself fallen in place of the boy, he could have had no remedy. It does not seem to be reasonable that his request to the boy to take his place, without any authority, general or special, can elevate the boy to a higher position than his own, and create a liability where none would attach had he performed the service himself. It is not like the case of one injured, while on board a train, by the sufferance of the conductor, whose general authority extends to receiving and

for \$1,800 was affirmed. The rule of damages in such action by father for injury to his son is, "compensation for the loss of services, for nursing and for surgical and medical attendance." It was held (as per syllabus) that "if the injury would not have occurred but for the hole in the roadbed, the defendant's negligence, in suffering it to be there, was a cause of the injury sufficiently proximate to entitle plaintiff to maintain action. Though the defect in the roadbed was not caused by any act of the company, yet if they knew of its existence, and that the street was made dangerous thereby, it was their duty to have it repaired; and neglecting to repair, they were liable for the consequences of their negligence." Question of negligence of boy, applying the same standard of care as would be judged of boys of his age, was properly for the jury.

1. In *CALDWELL v. BROWN*, 3 P. F. Smith (53 Pa. St.), 453 (1866), an action for damages for death of plaintiff's son, a minor, who was killed by an explosion of a boiler in defendant's mill where he was employed, judgment for plaintiff was affirmed, it being held on the question of damages that "parents in an action for the death of a minor child can recover only the pecuniary value of his service during minority;

not for their agonized feelings or loss of their son's society."

In *WEGER v. PENN. R. R. CO.*, 5 P. F. Smith (55 Pa. St.), 460 (1867), where an employee riding on a hand car was struck and killed in a collision with a train, judgment for defendants was affirmed, the negligence, if any, causing the injury being that of a fellow-servant, for which the railroad company was not liable in damages.

In *CUMBERLAND VALLEY R. R. CO. v. MYERS*, 5 P. F. Smith (55 Pa. St.), 288 (1897), judgment for plaintiff for \$2,550 was affirmed, the syllabus to the report stating the case as follows: "(1) A conductor of private freight cars, not in employ of a railroad company, at the request of the company's conductor of the train, cut loose the cars following his own, fell off the train and was injured. The court charged that 'if the injury was not caused by drawing the bolt, but by the negligence or misconduct of the engineer in increasing the motion of the cars, with a violent, unnecessary and unusual jerk, after the plaintiff had resumed his proper position on the car, such as he could not anticipate and guard against, he might recover.' Held, not to be error. (2) The plaintiff, after performing the duty he voluntarily undertook, having resumed his proper place as a passenger, became entitled to the protection which such relation gave him."

discharging persons to and from the train. *Penn. R. R. Co. v. Books*, 7 P. F. Smith, 339, 10 Am. Neg. Cas. 217. It is not like those cases where an injury happened to boys crawling under the cars to get through a train occupying a public street, which they had a right to cross. *Rauch v. Lloyd & Hill*, *supra* (1); *Penn. R. R. Co. v. Kelly*, 7 Casey, 372 (2). Nor does it resemble the case of *Lizzie Kay v. Penn. R. R. Co.*, 15 P. F. Smith, 269 (3), decided at Philadelphia last year, where detached cars were sent around a curve, without a brakeman in charge, upon a track which the public had been in the habit of traveling over constantly for a long time, with the knowledge of the company, from one part of the city of Williamsport to another. Here the boy was voluntarily where he had no right to be, and where he had no right to claim protection; where the company was in the use of its private ground, and was not abusing its privileges, or trespassing on the rights or immunities of the public. The only apology for his presence there is the unauthorized request of one who could not delegate his duty, and had no excuse for visiting his principal with his own thoughtless and foolish act. Nor can the mere youth of the boy change the relations of the case. That might excuse him from concurring negligence, but cannot supply the place of negligence on the part of the company, or confer an authority on one who has none. It may excite our sympathy, but cannot create rights or duties which have no other foundation.

Upon the whole case, finding no error in the record, the judgment is affirmed.

1. See this case, page 531, *ante*.

2. In *PENN. R. R. CO. v. KELLY*, 7 Casey (31 Pa. St.), 372 (1858), boy nine years old creeping under cars, which blocked crossing, and run over by sudden start of same, one of his feet being injured, judgment for plaintiff for \$3,000 was reversed for erroneous instruction as to damages in such a case, it being held that "where a father sues for damages, resulting from an injury to his child, he can only recover compensatory damages, to be measured by the loss of the child's

services, and his expenses in nursing and curing him; he cannot recover for his lacerated feelings or disappointed hopes. The injuries sustained by the child, such as his personal sufferings, the loss of a limb, etc., would be the subject of an action by the child himself, but should not enter into the computation of the father's damages." [For a similar case, see the rulings in *Rauch v. Lloyd & Hill*, 7 Casey, 358, reported on page 531, *ante*.

3. See this case, page 525, *ante*.

## PHILADELPHIA AND READING RAILROAD COMPANY V. LONG ET UX.

*Supreme Court, Pennsylvania, January Term, 1874.*

[Reported in 75 Pa. St. 257.]

**SPEED OF TRAINS RUNNING THROUGH TOWNS AND CITIES.** — While it is true that trains must be run at a high rate of speed to reach their greatest utility, yet in populous towns and cities the speed must be moderated, in view of the danger to life, limb and property.

**NEGLIGENCE OF PARENT PERMITTING YOUNG CHILD ON STREET.** — It is negligence in parents to permit a child less than three years of age to wander upon a railroad track, where trains are constantly passing.

**CHILD KILLED BY TRAIN — NEGLIGENCE OF PARENT — QUESTION FOR JURY.** — But where a child less than three years of age wandered from her mother's house onto the railroad track, and was killed by a train, it was a question of fact for the jury to determine whether the mother was negligent in permitting the child to get out of custody.

*Following Kay v. Penn. R. R. Co., 15 P. F. Smith (Pa.), 269 (1).*

**SPEED OF TRAIN — QUESTION FOR JURY.** — It was also held that it was for the jury to pass upon the question of speed of train and the negligence, if any, of the railroad company.

**ERROR to the District Court of Philadelphia: No. 24, to July term, 1872. Judgment for plaintiffs affirmed.**

"This was an action on the case, brought August 31, 1871, by Jacob V. Long and May, his wife, against The Philadelphia and Reading Railroad Company. The cause of action was the alleged negligence of defendant's servants, which resulted in the death of Rosanna Long, a child of the plaintiffs, who was run over by one of defendant's engines.

"The defendant's road from Norristown to Philadelphia passes along Cresson street in Manayunk; the depot in Manayunk is at the intersection of Cresson street by Gay street; Cotton street crosses the railroad on Cresson street, and is 774 feet from Gay street, in the direction of Philadelphia; between Gay and Cotton streets, Levering and Grape streets cross the railroad, Grape street being nearest to Cotton street; from the station at Gay street toward Cotton street there is an up-grade of thirty-two feet to the mile, which is a 'stiff' grade for starting; the track is perfectly straight from Gay street station to Cotton street. On May 10, 1871, the train from Norristown to Philadelphia, after leaving the Gay street depot, near Cotton street crossing, ran

1. See abstract of the Kay case, on page 525, ante.



over the plaintiff's child, who was about twenty-five months old; the train, including cars, engine, etc., was 325 feet long; Cresson street is about fifty feet wide; the two tracks of the railroad are in its center, and are altogether sixteen feet wide. Each side of the street is built up with houses, and many people pass along the street, going from Cotton street to the depot. The elevation of the railroad track is higher than the street curb, sloping to the curb on each side, and the roadbed is considerably higher than the sidewalks. \* \* \*

"Mary A. Long, plaintiff, testified: 'I live in Cresson street, between Cotton and Grape; when I saw the child she came and asked me for a piece of bread, and by that I went to do my housework, and she went out, and the first thing I knew, she was run over; she was not more than a few minutes out of my sight — about three or four minutes; \* \* \* I did not notice the train pass; we live on the line of the railroad; \* \* \* when I last saw my little girl, I gave her a piece of bread and left her in the kitchen; she must have opened the back door and got out through the alley; my mother was in the house with me; I did not notice her go out; I left her in the kitchen; I went to scrub a piece of oilcloth in the next room; \* \* \* I was in the middle room; you could not see from one to the other; I had not noticed her go out; I was by the hearth; she got into the alley; the side door goes right out into the alley; it was latched, but she opened it; she was in the kitchen; I did not miss her at all; I did not know at that time whether she was in the kitchen or out in the street; she had been in the yard playing when she came in and asked me for a piece of bread.' "

[Here follows the testimony of plaintiff Mary A. Long, Jacob Peterman, Samuel A. Moore, John Nicholls, and Benjamin Levering, for plaintiff; and the testimony of F. G. Wilson, defendant's superintendent; Daniel Miller, the engineer; William Grady, the fireman, and the conductor, for defendant, which is sufficiently noticed in the opinion, and is here omitted.]

"The defendant's points, all of which were affirmed, were:

"'1. The mere fact of the child having been killed on the defendant's railroad raises no presumption that her death was caused by negligence on the part of the defendants.

"'2. The verdict must be for the defendants, unless the evidence clearly establishes that the death of the child was caused by want of ordinary care on the part of the agents of the defendants,

in the management of the train, and that the parents of the child took all proper precautions for her safety.

“ ‘3. The men in charge of the train were not bound to anticipate that any person, either infant or adult, would cross the track, immediately in front of the engine, and that the defendants are not responsible for an omission to provide against such a contingency.

“ ‘4. When an infant, less than two years and two months old, is suffered to wander on a railroad track, where trains are constantly passing, the parents of such an infant are guilty of negligence, which precludes their recovering damages for the death of the child by being accidentally run over by a passing train.

“ ‘5. Should the jury find for the plaintiffs, damages can be assessed only for the pecuniary loss which the evidence shows they have actually sustained, and that neither the bodily sufferings of the child nor the mental sufferings of the parents can be taken into consideration.’

“The court further charged :

“ ‘Upon these general principles you will consider the facts of the case. The foundation of this action is the negligence of the defendants. Without this no recovery could be had, even if this was a suit by the child for injury to it. (It is for you to say whether the defendants used such reasonable care and diligence as were required at that time and place.) Negligence is not to be presumed; it is for the plaintiffs to show it. On that subject you have some evidence in relation to the speed of the train; the discrepancy between the witnesses is not very great, it all runs from five to eight miles; Levering said it was about eight miles; the others, between five and six miles; it is manifest the rate was between five and eight miles (it is for you to say whether that rate of speed was excessive, and whether, if excessive, it contributed to the accident); if the rate of speed did not contribute to the accident, it was not negligence. There were only two witnesses who saw the accident, Samuel Moore and Benjamin Levering. You will give particular attention to these two witnesses. \* \* \* Upon this testimony you will consider whether the negligence of the defendants caused the injury, or whether it was one of those unfortunate accidents which could not be prevented. If the child was playing near the track, and from fright, or even from heedlessness, or any other motive, suddenly darted in front of the train, the defendants could not

be required to foresee and provide against such a contingency. That is one of those misfortunes for which there is no remedy.

“ ‘The second inquiry to which you will direct your attention is, Did the parents take such care of the child as the circumstances required? The child appears to have been able to lift the latch of the door and go out; the law upon this point has been very strictly laid down (and the fact that the child is found in the street affords a strong presumption of negligence on the part of the plaintiffs. You will, therefore, consider whether the mother took reasonable care of the child; if she did not, it was negligence), and if you find the parents to have been negligent, you must find for the defendants. That is a good defense to the action.’

“The verdict was for the plaintiffs for \$1,200. Upon the removal of the record to the Supreme Court by the defendants, they assigned for error the portions of the charge in brackets.”

T. HART, JR., and J. E. GOWEN, for plaintiffs.

J. DOLMAN, for defendants.

**Agnew, Ch. J.** — This case has been argued by the eminent counsel of the railroad company, as if the facts were fixed with the certainty of a special verdict. If we assume that the child, Rosanna Long, suddenly appeared upon the track, five or six feet ahead of the locomotive on the left-hand side; that the engineer was in his proper place on the right side of the engine cab, looking out constantly, but his vision, for several feet in front of the cow-catcher, was obstructed by the boiler and carriage of the engine; and that the fireman was at his post, ringing the bell, and unable to keep a lookout on the left-hand side of the engine; we might conclude that the death of the child was an accident, not within the power of the engineer to avoid, and that the court might have given a binding instruction to the jury. Then, indeed, the rate of speed would be immaterial, for, upon such a sudden appearance of the child on the track, no rate of speed, no matter how slow, could have saved it. But it was because these facts were not so fixed and certain, that the question of negligence must necessarily go to the jury, to ascertain exactly how they were; and for the same reason the rate of speed became an element properly belonging to the case. Only two witnesses saw the accident happen. One of them, S. A. Moore, coming out of an alley into Cotton street, which crosses Cresson street and the railroad track at right angles, saw the

child and the locomotive at the same instant at the crossing. To him the sight and the accident were simultaneous, so that his testimony gives us no information of the previous position of the child. The other witness, Benjamin Levering, saw more. He crossed Cresson at Cotton street; saw the engine coming. Saw it when it left the depot at Gay street. The child was then on the upper side of the road; after crossing, he himself turned up Cresson street, and in doing this turned his back upon the child; for he says, just as I turned round the child went on the track, and the cow-catcher struck her; the train was going over eight miles an hour. In his cross-examination, he says, when he got opposite to the store at the upper corner of Cotton street, the child was then on the side of Mr. Long's house, and when he got over, the child was between the tracks. Thus it is very evident the testimony of this, the only witness who saw the child before the train reached Cotton street, left it an open question of fact where the child was, and whether she was not visible to the engineer, had he kept a constant lookout, while the train was moving up Cresson street, before it reached Cotton street, and whether a slower rate of speed would not have enabled the engineer to discover the child, as well as to reverse his engine before it came upon her. Two of the witnesses testify the speed to have been not less than eight miles an hour, and Levering gives as a reason for his belief, that he had lived there all his lifetime, and, of course, was in the habit of judging of the speed. Thus it is evident that the position of the child, while the train was moving up Cresson street, the lookout of the engineer, the place of the fireman, the rate of speed, and all the circumstances, were matters entering into the question of negligence, taken in connection, also, with the all-important fact that Manayunk is a closely built, populous town, Cresson street a public thoroughfare, not of great width, where many persons of all ages, sexes and condition are constantly passing and repassing, and crossing the tracks of the railroad rightfully. It was, therefore, clearly the province of the jury to ascertain from the evidence the true position of the child while the train was moving up Cresson street, when and how far the engineer ought to have seen the child in advance of the locomotive, and whether he was keeping a due lookout, and a properly regulated rate of speed, in traversing a populous street. It was in view of this duty of the jury, the instructions of the judge, contained in the first three assignments of error, were apposite and correct.

We disagree emphatically to the position taken by the learned counsel of the railroad company that the rate of speed at the time was not material, and that seven or eight miles an hour is a rate of speed compatible with safety in passing through the streets of a populous town. While it is true that trains must be run at a high rate of speed to reach their greatest utility, populous towns and cities must be exceptions, when the speed must be moderated in view of the danger to life, limb and property. Where the people and the trains have a common right to be, and to have a joint use of the highway, the rights of each must be regarded. These remarks dispose of the first three assignments of error.

There can be no just complaint against that part of the charge recited in the fourth assignment. It does not contradict the answer to the defendants' fourth point. The learned judge affirmed all his points, including the fourth, stating that it is negligence and would prevent a recovery for parents to suffer an infant less than two years and two months old to wander upon a railroad track when trains are constantly passing. In that part of the charge recited in the fourth assignment the judge said, "that the fact that the child is found in the street affords a strong presumption of negligence on the part of the plaintiffs. You will, therefore, consider whether the mother took reasonable care of the child; if she did not, it was negligence." To suffer a child to wander on the street has the sense of permit. If such permission or sufferance exist, it is negligence. This is the assertion of a principle.

But whether the mother did suffer the child to wander is a matter of fact, and is the subject of evidence, and this must depend upon the care she took of her child. Such care must be reasonable care, dependent on the circumstances. This is a fact for the jury. If she did not exercise this care, she was negligent. What more than this can be demanded of her? When a railroad runs through a populous city, has the company a right to exact a harder measure, and are we to say, as a matter of law, that the citizens are to be imprisoned in their houses, or their children caged like birds, otherwise it is negligence for the poor who congregate these crowded streets, unless, even in the summer's heat, they live shut up in the noisome vapors of their closed tenements, without a breath of healthy air? Is this the life they must lead or be adjudged to be negligent? This mother

gave her child a piece of bread, to satisfy it, closed the kitchen door to keep it in, and went to the next room to scrub the oil-cloth on the floor, and before her labor was finished, and in less than five minutes, the mangled body of her little one was brought in and laid before her. We have no reason to believe that her love for her child was less than that of the more favored of her sex, having servants at their beck. Because the child managed to lift the latch and momentarily disappeared, are we to say this was negligence *per se*, and that she suffered her child to wander into the street? What sort of justice is that which tells the mother agonizing over her dying child, your negligence caused this? You suffered your child to run into the jaws of death. We cannot perceive any fault in the railroad company. A speed of eight miles an hour along this populous thoroughfare was all right. We can indorse no such cruel doctrine; but we must say, as we said in *Kay v. Penn. R. R. Co.*, 15 P. F. Smith, 269 (1), the doctrine which imputes negligence to a parent in such a case is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil.

The judgment is affirmed.

BOY RUN OVER BY COAL TRAIN — TRESPASSER. — In *McMULLEN v. PENNSYLVANIA R. R. CO.*, 132 Pa. St. 107 (1890), boy, ten years old, run over by coal train while he was trespassing on track; judgment for plaintiff was reversed. From the statement in the official report it appeared that "the case was first tried November 14, 1887, when, at the close of the plaintiff's testimony, the court entered judgment of compulsory nonsuit. Afterwards, on motion of the plaintiff, the judgment of nonsuit was vacated. At the second trial, on February 13, 1888, the following facts were shown:

"The defendant company has three tracks upon and along Trenton avenue, Philadelphia. On August 9, 1884, and for two or three days prior thereto, a train of loaded coal cars was standing on one of these tracks, between Dauphin and Ohio streets, occupying nearly the whole length of the square. The cars were coupled together, and there was no break or opening in any part of the train, and the train did not cover any crossing. About noon on the day named, an engine pushing a number of box cars was brought along the same track on which the coal cars were standing, and the

1. See abstract of this case, page 525, ante.

train of box cars was joined to the coal train for the purpose of moving the latter. When the two had been coupled together, and just as they were about to move, Gertrude Horsfall, looking out of the window of her house, on Trenton avenue, saw the plaintiff's son on the track beneath the coupling, between two of the coal cars, lying on his back, his head between the rails and his feet hanging over one of them. The train starting, one car passed over the boy and cut off his foot; then four car wheels passed over him, before the train was stopped, in consequence of an alarm given by the witness. The injuries thus inflicted on the boy caused his death about three hours later. When he was picked up, a tin pan, partially filled with coal, was found beside him. Mrs. Horsfall was the only person who witnessed the accident. Her testimony describing it, given on behalf of the plaintiff, is quoted in the opinion of the Supreme Court, *infra*. No witness could give any account of the movements of the deceased immediately prior to the time when he was seen by her, just as the train was starting. The last previous sight of him, by any witness, was about five minutes before the accident, when he started away from the house of his aunt, on a street parallel with and a square away from Trenton avenue, where he was temporarily residing. At the time of the accident, he was ten years and four months old. Mrs. Horsfall testified that she heard no bell rung or other warning given that the train was about to move, and that none of its crew were in sight. Testimony for the defendant tended to prove that warning was given." \* \* \*

"The verdict of the jury was in favor of the plaintiff for \$1,500. A rule for a new trial having been discharged, judgment was entered on the verdict, whereupon the defendant took this appeal.

"The case was argued on January 18, 1889, before PAXSON, Ch. J., STERRETT, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ. On April 8, 1889, a reargument was ordered before a full bench, and reargument had on January 13, 1890. GAVIN W. HART (DAVID W. SELLERS with him), appeared for appellant; WILLIAM H. BURNETT, for appellee.

The opinion by the Supreme Court is as follows:

GREENE, J. — On the trial of this case, the plaintiff examined but one witness to prove the fact and the circumstances of the accident. This is the account she gave of the occurrence: "Q. Please state just what you saw of this accident. A. When I saw the child, he was lying on the flat of his back; his head towards the station house, and his feet towards me. Q. How was his body; on the track? A. Right in the middle of the track, his body was; and his head. Q. Between the tracks, between the rails, do you mean?

A. Yes, sir. Q. Crosswise? A. Yes, sir; his feet towards me, and his legs hanging over. Q. How near was it to your house? A. Right opposite the east window, towards Dauphin street. Q. Which window was you looking out of? A. The last one towards Dauphin street. Q. What room of that house? A. There was only one room of that house. Q. What happened after that? A. I saw him before the cars moved at all; they were just slightly moving; just commencing in motion; and he, of course, didn't make no effort to get up; I said to my stepmother: 'There's a child on the track, and he'll be run over,' and she started out on Blair street and commenced to halloo, and I went out front. Q. That is out on Trenton avenue? A. Yes, sir; the first car went over him, and cut his foot right off; then four car wheels went over him before there was any assistance came."

The witness had previously testified that there was a train of small coal cars standing on the track, reaching nearly a square, the majority of which were full, and it was under these cars that the boy was lying on his back, immediately before and at the time he was run over and killed. She also said the whole train was coupled together; that there was no opening between the cars, and the place of the accident between two streets. There was no contradiction of these facts; on the contrary, they were confirmed by the defendant's witnesses, as to everything they saw, but none of them saw the actual collision. Several of the trainmen, who were examined, came to the spot immediately after the accident, and one of them lifted the boy out from underneath the car. Two of them testified to seeing a pan about half full of coal by the side of the boy, and one of them removed it.

The undisputed facts, therefore, are, that the boy, just before the accident, was lying on his back on a railroad track, crosswise the track, with his feet reaching over one of the rails, and his head between the rails. The train was just starting, and was moving slowly, so that it was stopped when four wheels had passed over the boy. He was lying underneath the cars, and there is no evidence that he was endeavoring to cross the track. As a matter of course, he was not, and could not be, in such circumstances, in the exercise of any legal right. Railroad tracks are not made for persons, young or old, to lie down upon, in any circumstances; much less so when cars are standing on the track. They are not intended for any such use, and any person who makes such use of a track is undoubtedly a trespasser.

The question is not an open one. Had this boy been an adult, as a matter of course, he could not have recovered, both because of



his own negligence and of his being a trespasser. The boy was ten years old, and, therefore, cannot be held accountable for his own negligence. But, as a clear trespasser, recovery is equally impossible, notwithstanding his youth, and this we have many times decided. In every one of the following cases we held there could be no recovery, although the persons injured were children, upon the express ground that they were trespassers: *Phila., etc., R. Co. v. Hummell*, 44 Pa. St. 375; *Flower v. R. R. Co.*, 69 Pa. St. 210, 12 Am. Neg. Cas. 524; *Duff v. R. R. Co.*, 91 Pa. St. 458, 10 Am. Neg. Cas. 215, n.; *Cauley v. R'y Co.*, 95 Pa. St. 398; s. c., 98 Pa. St. 498, 10 Am. Neg. Cas. 215, n.; *Hestonville Pass. R'y Co. v. Connell*, 88 Pa. St. 520; *Moore v. R. R. Co.*, 99 Pa. St. 301 (1); *B. & O. R. Co. v. Schwindling*, 101 Pa. St. 258, 10 Am. Neg. Cas. 103, n. In several of them, the child was considerably younger than in this case. In not one of them was the trespass of the child so gross, so palpable, so conspicuous, as in this. The doctrine has been so elaborately discussed and so fully expounded and illustrated in several of the opinions of this court, in the cases referred to, that it is entirely unnecessary to repeat the discussion here.

We are clearly of opinion that the defendant's ninth point [direction of verdict for defendant] should have been affirmed, and a

1. In *HESTONVILLE PASSENGER R'y Co. v. CONNELL*, 88 Pa. St. 520 (1879), boy, about seven years of age, attempting to jump on front platform of moving street car, falling therefrom and run over, judgment for plaintiff was reversed, the company not being liable for the act of the child in trespassing upon the car, it being held that the accident occurred, not because of any defect in the vehicle, nor from the neglect of the person in charge of it, but from the sudden and unanticipated act of the child itself, which could neither be foreseen nor guarded against. (*Following Phila. & Reading R. R. Co. v. Spearen*, 11 Wright, 300, reported on page 532, *ante*.)

In *MOORE v. PENNSYLVANIA R. R. Co.*, 99 Pa. St. 301 (1882), judgment of nonsuit was affirmed on the following facts (as per syllabus to the official report): "A boy, ten years old, bright, intelligent, strong, healthy and of rather exceptional capacity, was sent

by his parents upon an errand, along a street in a populous suburb of a city, on which a railroad track was constructed. He was run over and killed by a passing train, moving at a very rapid rate of speed, without whistle or other signal. The only witness of the accident declared that he saw the boy walking upon the outer ends of the sleepers a single instant before he was struck. The street was of ample breadth and had sufficient sidewalks, and the errand upon which the boy was sent did not require him to cross the track at the point where he was killed. In an action by the boy's parents against the railroad company, to recover damages, for his death, the plaintiffs adduced evidence which showed the facts to be as above. The court thereupon awarded a nonsuit on the ground of the boy's contributory negligence. Held, that this was not error."

verdict for the defendant directed. Judgment reversed. **STERRETT and CLARK, JJ.**, dissented.

**CHILDREN INJURED AT CROSSINGS AND ON STEAM AND STREET-RAILROAD TRACKS.**

Among the numerous Pennsylvania cases relating to Accidents to Children (other than those reported in this volume of AM. NEG. CAS.), are the following:

*Child on siding run over by train — Trespasser.*

In **PHILADELPHIA & READING R. R. Co. v. HUMMELL**, 44 Pa. St. 375 (1863), where plaintiff, who was seven years old, was run over by defendant's cars while upon a siding, judgment for plaintiff was reversed, it being held that "the use of a railroad track, cutting, or embankment, except at lawful crossings of public roads or highways, is exclusively for the company and their employees; and a railroad company is not liable for an injury to a person at a place on the railroad where he had no right to be, where want of ordinary care on part of the company is not shown."

*Run over by train in street.*

**PITTSBURG, ALLEGHENY & MANCHESTER R'y Co. v. PEARSON**, 72 Pa. St. 169 (1872); child, eighteen months old, wandering from home, run over and killed by train on street; judgment for plaintiff for \$900 reversed; question of contributory negligence of parents in permitting child to get on track, for jury.

*Run over by train and killed — Damages.*

**PENNSYLVANIA Co. v. JAMES**, 81 Pa. St. 194 (1874); child, nineteen months old, run over and killed by train; judgment for plaintiffs for \$1,600 affirmed; measure of damages, pecuniary loss to parents; in suit by child of tender years for injury, defense of contributory negligence will not avail, but in suit by father or mother, contributory negligence of parent is a defense.

*Child passing between cars at crossing.*

**PHILADELPHIA, BALTIMORE & WILMINGTON R. R. Co. v. LAYER**, 112 Pa. St. 418 (1886); child, about seven years old, attempting to cross track at street blocked by train, and while passing between cars, the train was suddenly started and plaintiff was injured; judgment for plaintiff for \$7,500 affirmed.

*Child using general footpath struck by train.*

**TAYLOR v. DELAWARE & HUDSON CANAL Co.**, 113 Pa. St. 162 (1886); child, eight years old, struck by train of cars while crossing track at footpath habitually used by public; judgment of nonsuit reversed.

*Run over by flat cars — Trespasser.*

**MITCHELL v. PHILADELPHIA, WILMINGTON & BALTIMORE R. R. Co.**, 132 Pa. St. 226 (1890), boy, about ten years old, run over by flat cars; trespasser; nonsuit affirmed.

*Child crossing street run over by street car.*

**GLASSEY v. HESTONVILLE, MANTUA & FAIRMOUNT PASSENGER R'y Co.**, 57 Pa. St. 172 (1868); plaintiff's son, a boy of about four years of age, while crossing street, run over and killed by horse car; judgment for plaintiff reversed; negligence of parent in permitting child of tender years to be on street alone; though child may recover for injuries to which he contributed by his own imprudent act, the father cannot.

*Child escaping from parent run over by street car.*

PHILADELPHIA CITY PASSENGER R'Y CO. *v.* HENRICE, 92 Pa. St. 431 (1880); child, about sixteen months old, escaping from custody of mother in house, going into street and run over by street car; judgment for plaintiff reversed for erroneous instructions as to duty of driver, and for erroneous admission of certain evidence.

*Run over by street car—Dangerous employment—Contributory negligence of parent.*

SMITH *v.* HESTONVILLE, MANTUA & FAIRMOUNT PASSENGER R'Y CO., 92 Pa. St. 450 (1880); child, about seven years old, run over by street car; habit of child to get on and off cars to serve drivers and others with water to drink; contributory negligence of mother to permit child to engage in such employment; nonsuit affirmed.

*Boy jumping off street car and run over.*

HESTONVILLE, MANTUA & FAIRMOUNT PASSENGER R'Y CO. *v.* KELLEY, 102 Pa. St. 115 (1883); boy, about seven years old, whose hat was blown off while on front platform of car, jumping off, while driver was attending to switch, and run over and killed by car; no evidence of negligence on driver's part; judgment for plaintiffs for \$2,500 reversed.

*Run over and killed by street car.*

SCHNUR *v.* CITIZENS' TRACTION CO., 153 Pa. St. 29 (1893); boy, six years old, run over and killed by cable car; judgment for plaintiff for \$600 affirmed.

*Boy struck and killed by street car.*

JAQUINTA *v.* CITIZENS' TRACTION CO., 166 Pa. St. 63 (1895); boy, between twelve and thirteen years of age, jumping across ditch to look down same, struck and killed by street car; judgment for plaintiff for \$500 affirmed.

*Child run over by street car.*

HARKINS *v.* PITTSBURG, ALLEGHENY & MANCHESTER TRACTION CO., 173 Pa. St. 146 (1896); child, about three years old, run over by street car; judgment for \$1,400 affirmed.

In action by child itself in HARKINS case (173 Pa. St. 149), judgment for the plaintiff for \$3,150 was affirmed.

*Run over by street car.*

EVERS *v.* PHILADELPHIA TRACTION CO., 176 Pa. St. 376 (1896); child, four and a half years old, run over by street car; judgment for plaintiffs for \$1,500 affirmed.

BOY DRIVING ACROSS TRACK KILLED BY TRAIN — FAILURE TO SIGNAL QUESTION FOR JURY — NONSUIT REVERSED. — In LONGENECKER *v.* PENNSYLVANIA R. R. CO., 105 Pa. St. 328 (1884), action for damages for death of boy, twelve years of age, who, while driving over grade crossing, was struck and killed by defendant's train, judgment of nonsuit was reversed, the facts (as per statement in the official report) being as follows:

"On the trial, the evidence on behalf of the plaintiffs was to the following effect: On the morning of October 10, 1882, Harry Longenecker, twelve years of age, was driving a team of mules in a lime wagon on the public road, where it crosses at grade the defendant's railroad, about half a mile west of Berwyn station, which is east of Paoli. At the crossing in question a high embankment rises on both sides of the railroad, and runs westward for about three-quarters of a mile. No one saw the boy or the wagon, while he was in the act of approaching or going upon the crossing. While in the act of crossing, the wagon was struck by a train, and the boy was killed.

"The engineer was the only person who saw the boy and wagon, prior to the accident. He was called by the plaintiffs and testified that it was a regulation of the company not to whistle in approaching crossings east of Paoli, except in case of special danger of accident, but that notice of the approach of trains should be given by ringing the bell a quarter of a mile from a crossing or station. Upon cross-examination, defendant's counsel asked the witness:

"Q. 'You said you were the engineer of the milk train, that struck this boy; will you tell us whether you rang the bell before you struck the wagon?' [Objected to; objection overruled; exception. First assignment of error.] The witness answered that he rang the bell near half a mile from the crossing, to warn repair men on the track, and the fireman was ringing the bell when he saw the wagon on the track and whistled, but he could not say at what point the fireman began to ring, nor whether he rang it a quarter of a mile from the crossing.

"Several witnesses who were in the neighborhood of the crossing at the time in question, testified that they heard no bell and no whistle, prior to a sharp whistle, which was almost instantly followed by the crash of the locomotive striking the wagon. One witness testified that he had a skittish horse tied in the road near the crossing, while he was delivering flour to a customer, and he was paying particular attention to listening for any train signal, so that he could start for his horse if he heard a train coming, but he heard no warning prior to the shrill whistle, which was almost immediately followed by the crash of the collision. He said that if a bell had been rung on the engine prior to the whistle, he had no doubt that he would have heard it; that on another occasion, under similar circumstances, he had heard the bell distinctly, as a warning of the approach of the same train.

"At the close of the plaintiff's case, the defendants moved for a compulsory nonsuit.

"The court: It does not appear to the court that there is evidence to sustain a verdict, if rendered, for the plaintiff. In regard to the point as to whether a railroad company could substitute the ringing of a bell for a whistle, as it is a regulation of the company to use a bell east of Paoli, instead of blowing a whistle, until the Supreme Court say that they cannot substitute the ringing of a bell for the blowing of a whistle, we will hold that to be sufficient. The motion for a compulsory nonsuit is granted. A rule to take off the nonsuit was discharged by court.

"The plaintiffs took this writ of error, assigning for error, *inter alia*, 1, the admission of the question on cross-examination of the engineer, above noted, and, 5, 6, the refusal of the court to take off the judgment of nonsuit. (R. JONES MONAGHAN and R. E. MONAGHAN (JAMES MONAGHAN with them), appeared for plaintiffs in error; JOHN J. PINKERTON, for defendant in error.)

STERRETT, J., delivered the opinion of the court, in which the judgment of nonsuit was reversed and a *venire facias de novo* awarded, on the ground, among others, that whether the ringing of a bell, without blowing the whistle, is a sufficient warning of the approach of a train at a crossing, is a question for jury to determine from the circumstances, and not for the court to determine as a matter of law.

## PENNSYLVANIA RAILROAD COMPANY v. McCLOSKEY'S ADMINISTRATOR.

*Supreme Court, Pennsylvania, 1854.*

[Reported in 23 Pa. St. 526.]

**DROVER IN CHARGE OF STOCK KILLED IN COLLISION BETWEEN TRAINS - DAMAGES - LIMITING LIABILITY.** — In an action by an administrator to recover damages for the loss of the life of his intestate, through the defendant's negligence, the court instructed the jury that they might compute the damages by the probable accumulations of a man of the age, habits, health and pursuits of the deceased, during what would have probably been his lifetime; and added, that if the jury could find a better rule, they were at liberty to adopt it. *Held*, that there was no error in this direction.

The jury must, in such case, place a money value on the life of an individual, in the same manner that in other cases they estimate the value of health and reputation. The law can furnish no definite measure for damages that are essentially indefinite.

A railroad company carrying passengers, cannot shield themselves from the consequences of their negligence, by showing that a person injured obeyed specific instructions of the conductor, instead of general directions, of which he had been informed.

Assuming that a public company of carriers may contract for other exemptions from liability than those allowed by law, still a contract will not exempt from liability for gross negligence.

A regulation by which a passenger with live stock, on the freight train, is required to remain on the cars which contain his stock, is not so transgressed by his being in another part of the train, when it is at rest, as to make him a contributor to his own injury by that train being run into by another.

(Syllabus to the official report.)

ERROR to the District Court of Allegheny County. *Judgment for plaintiff affirmed.*

"Action on the case against the Pennsylvania Railroad Company for the loss of the life of William McCloskey by the negligence of the agents or servants of the company. The action was brought by the administrator of the estate of the deceased.

"William McCloskey, on March 1, 1853, put on board the company's cars, at Pittsburgh, a drove of horses destined for Philadelphia. It appeared in evidence that the regulations of the company required that, before any undertaking to carry live stock should be made, the owner of the stock should sign an agreement to travel on the cars containing his stock, and give his care and attention to it, act under the orders of the conductor, and release the company from all liability for personal injury, however incurred; and there was some evidence, but strongly contradicted, that such an agreement had been signed by him, and that he knew of the regulation.

"When the train was on its way, on March 3, about eleven o'clock at night, near Newton Hamilton, it was stopped by the bursting of a flue of the engine. Arrangements were immediately made to warn approaching trains of the accident; but, for reasons not necessary to mention, the warning failed to reach the train from the west, and a collision followed, which caused such injury to McCloskey that he died in a short time. The jury found that the collision arose from the gross negligence of the company's agents.

"When it happened, McCloskey was not in the cars containing his stock, and those cars sustained no injury; but he was in the emigrant car, which was crushed by the collision, and the jury found that he was there by the direction of the conductor.

"McCloskey, at the time of his death, was childless and unmarried, and he left two sisters as his next of kin, and it did not appear that they had suffered any pecuniary loss by his

death. It was, therefore, contended that no more than nominal damages could be recovered; but WILLIAMS, J., thought otherwise, and instructed the jury as appears in the opinion of this court. He further instructed them that the direction of the conductor entitled McCloskey to be in the emigrant car, and that the release from liability, if signed by McCloskey, did not protect the company from damages occasioned by the gross negligence of its agents. These instructions were the principal matters complained of as error. The plaintiff had a verdict and judgment for \$4,500.

"By the act of 1st April, 1836, it is provided, that if any person shall become injured, either in person or property, through or by reason of the gross negligence or wilful misconduct of the driver of any public stage, etc., carriage, or car, employed in the conveyance of passengers, or through or by reason of the gross negligence or wilful misconduct of any engineer or conductor of any locomotive, engine, etc., 'such driver, engineer, or conductor shall be deemed guilty of a misdemeanor;' and on conviction shall be punished by a fine not exceeding \$50, and by imprisonment not exceeding twelve months, 'provided that the provisions of this act shall not interfere with the civil remedies against the proprietors or others to which the party injured may by law be now entitled.'

"By the 18th section of the Act of 15th of April, 1851 (Acts, p. 674), it is enacted, that no action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff, but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction. Section 19. That whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned."

J. H. HAMPTON and STOKES, for plaintiff in error.

SHALER & STANTON, for defendant in error.

**Lowrie, J.** — The learned judge of the court below allowed the jury to find the damages according to the value of the life lost, and suggested that, in estimating them, they might compute them by the probable accumulations of a man of such age,

habits, health and pursuits, as the deceased, during what would probably have been his lifetime; and then added: "I think this would be a fair measure of damages in this case; but if the jury can find a better rule than the one suggested, they are at liberty to adopt it."

To this it is objected, that it gives to the representatives of the deceased more than compensation; that is, more damages than they have suffered by the death, and that this judgment acquires a punitive character, which, it is said, could not have been intended, since the law has manifested its punitive will in a different form, by providing for the punishment of the really guilty persons, the servants of the company, in the Act of 1st April, 1836.

The latter part of this argument is answered by saying that there are many cases in which vindictive damages are given though the act is also subject to punishment; and this is a denial of the unexpressed premises of the argument, and, therefore, the conclusion is left without support, and we are saved the necessity of showing that it is a mere assumption to call such damages punitive.

The main purpose of the argument, however, is to show that the representatives appointed by the law in such a case are entitled to no more damages than they have individually sustained, and it requires a more extended consideration.

Heretofore no action has been allowed among us for the death of a freeman, and the novelty of the case contributes to the difficulty of determining it, and warns us to proceed with appropriate caution. But, strange as the case is, in our jurisprudence, we are not without analogies here and elsewhere which may furnish us some light.

The principle that requires compensation for the death of a freeman is not at all new in history. It was long an institution among our Anglo-Saxon ancestors and perhaps it was never positively abolished, but rather died out under the influence of the Norman conquest, and the centralizing powers of the king's courts, which treated all such wrongs as wrongs done to the king — and hence as criminal offenses. It seems to have been an institution common to all Germanic nations, and perhaps to every people that rose one degree above the savage life, and were still striving to rise. With them it was intended as a compensation to surviving kindred, and as a means of preventing the disorders that follow in the train of private revenge.



There are indications of its existence among the Romans (Dig. 9, 2, 7, 4, also 9, 2, 9 and 31), though Pasquier (Inst. de Just. 4, 3) expresses doubts about it. Voet (Pandects, 9, 2, 11) and Pacius (Analysis Institutionum, 4, 3, 1) refer to it as existing there, and also in Holland, the Netherlands, and perhaps in some other parts of modern Europe, and we have evidence of its existence in Scotland. Erkine's Inst. 592, n. 13; Bell's Principles of Law, 749; *Blake v. Midland R'y Co.*, 10 Eng. L. & Eq. 437. As it existed among the Romans, the damages recovered by the kindred were not by way of hereditary succession, for damages for wrongs done to the body of a freeman were not allowed to pass in that way. Dig. 9, 3, 5, 5; Pothier's Pand. 9, 3, 12.

A recent English statute, 9 and 10 Vict. c. 93 (1), seems to have revived the principle of the old Saxon law, and to allow the relations of the deceased to recover damages to be apportioned among them according to the injury resulting to them respectively. In form, therefore, the action is for their own loss, and not a survival of the right of action for the injury to the deceased. Yet the English courts have not known how to estimate the damages, except according to the value of the life lost. *Blake v. Midland R'y Co.*, 10 Eng. L. & Eq. 437 (2);

1. *Lord Campbell's Act* (9 and 10 Vict., c. 93). The sections in Lord Campbell's Act, 9 and 10 Vict. c. 93, relating to damages (after reciting that no action at law is now maintainable against a person, who, by his wrongful act, neglect or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him) enacts, that whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall

have been caused under such circumstances as amount in law to felony.

By section 2, every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased. And in every such action, the jury may give such damages as they may think proportioned to the injury resulting from such death; to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the before-mentioned parties in such shares as the jury, by their verdict, shall find and direct.

2. In *BLAKE v. MIDLAND R'Y CO.*, 10 Eng. L. & Eq. 437, 18 Q. B. 93, it was held that in an action founded on the

*Armstrong v. Southeastern R'y Co.*, 11 Jurist, 758 (1); 6 Harr. Dig. 273; and this statute seems to leave other injuries to the person just as they were before, and consequently, a death from another cause, before compensation recovered, is not provided for.

But it is asked, how can one that is dead be compensated by a civil procedure, for injuries done to him in his life, and especially for the loss of his life? This directs us to another aspect of the present claim that is not as new as the one already noticed. In the early stages of our law, all rights of action for wrongs done, not breaches of contract, died with the injured person. This, however, was altered by statute 4 Ed. 3, c. 7, and this alteration has been very largely extended by construction and by our statute, 24th February, 1834, § 28, nothing was excepted but slander, libel and wrongs to the person. Many of the cases, thus declared to survive, involve questions of compensation, and exemplary damages for wrong and insult, fraud and malice, which are to be decided upon, and executed after the injured party is beyond the reach of civil compensation, and yet the injury is measured just as if he were still living.

There are abundant indications of the same law of survivorship in the Roman law, in regard to such injuries; Inst. 4, 12, 1; Dig. 44, 7, 26 and 58; Dig. 50, 17, 139 and 164; Heineccius *Elementa Juris.*, §§ 1193, 1194; Pacius *Analysis Inst.*, 4, 12; and these embrace a wider range of injuries than have been heretofore saved from death by our law; for they include all cases actually commenced in the lifetime of the injured party, and prevent their abatement by his death.

Our act of 15th April, 1851, seems to express its purpose better than the English one heretofore referred to; for in one section

9 and 10 Vict. c. 93, by the wife, husband, parent or child of a person killed by misfeasance, the jury, in estimating the damages, cannot take into consideration, mental suffering or loss of society, but must give compensation for pecuniary loss only.

1. In *ARMSTRONG v. SOUTHEASTERN R'Y CO.*, 11 Jurist, 758, an action to recover for the death of plaintiff's intestate, occasioned by negligence of defendant or its servants, it appeared that deceased was in the employ of de-

fendant and, while riding upon its car, in the course of employment, was thrown therefrom by a sudden jerk, and run over. The defendant claimed that the accident was caused by the negligence of the deceased himself. On the question of damages, the court charged the jury, that the amount could not be estimated according to annuity tables, but rather according to what the jury should consider a fair compensation to the family, for the loss of the deceased.

it simply provides that the action commenced for injuries to the person shall not abate by the plaintiff's death, but shall survive by substitution of his personal representatives; and in another, that if no suit for damages be brought during life by the party mortally injured, by negligence or violence, then the widow, and if there be no widow, the personal representatives, may maintain an action for damages for the death.

The first of these sections is very plain, and it provides that the personal representatives may continue the action commenced, that is, may proceed and recover the very damages to which the deceased would have been entitled had he survived until the verdict and judgment.

The other section is somewhat less definite in regard to the damages intended; but this very indefiniteness is proof that no other thought was in the mind of the legislature than the wrong and damage done to the decedent; else it would have been made to appear. If one section related to damages done to the deceased, and the other to damages done to his relatives, these contrasted thoughts could hardly have failed to come out clearly in the expression.

But even if this were otherwise, we do not perceive how it could influence the damages; for they must necessarily be measured by the absolute value of the life lost, and not by the pecuniary loss, which the designated representatives shall have thereby sustained. The precept involved in the law is, "Thou shalt not by negligence or violence take away the life of another;" and the sanction of the law lies in the duty of compensation for the life destroyed, measured according to its own merits and not according to the necessities and circumstances of his kindred. It is very hard to value; but not for that, more uncertain than the speculations in relation to damages, which are proposed in its stead.

This thought is involved in the whole course of the legislation and jurisprudence already referred to, and it is a rejection of the idea that the negligence which destroys life is irresponsible, and an assertion of the principle that all negligence must answer for its result, however serious. We have not hertofore been startled at the absurdity of giving a pecuniary compensation for broken limbs, or ruined health, or shattered intellect, or tarnished reputation.

If the body be all crushed, we have regarded its sufferings as a

subject of civil compensation, so long as life smoulders beneath the ruins; even though there be no capacity to appreciate or enjoy compensation. We ought not to be startled that the duty of compensation is continued, when such life is smothered out.

We call it compensation, while we admit that money is a very insufficient and uncertain measure of all such injuries. But it is the best standard we have, and in practice it is not found to be absurd. The duty of the wrongdoer to make compensation is very plain, and such as he has, which the law can reach, it compels him to give; though it may never reach the consciousness of the person injured. It is an act of distributive justice in vindication of invaded right, and it adopts the best approximation to compensation which the authority of the law can enforce. And in these times, when criminal justice presents so many symptoms of going out of repute, and police officers are so often held up to public indignation, for their performance of duty, it is found to operate well. Call it punitive; yet it is only indirectly so, as all compensation is, and does not wipe out any offense that is involved against the State. From our present experience and observation, therefore, we are unable to discover any substantial error in the instructions complained of. It would be wrong to limit the value of a man's life by his probable accumulations, for many men make none in a lifetime, and many have arrived at an age when they no longer attempt to make any, and many women never make any; and yet every one is entitled to his life, and we have as yet discovered no standard for its valuation. It is not human possessions that are destroyed, but humanity itself; and as this has no market value, it must necessarily be very much a matter of human feeling.

Hard, then, as the task may be, and however uncertain its result, it is to be performed by the jury, aided by the cautions and counsels of the judge, who has been trained in the consideration of juridical questions. Looking, on the one hand, to the dignity of human nature, as it has been assailed, and on the other, to the position and rights of the defendant, and considering the dignity of their positions as judges of most sacred right, and their own dignity and responsibility as individuals, and loving mercy, even while doing justice, the jury must place a money value upon the life of a fellow-being, very much as they would upon his health or reputation. The law can furnish no definite measure for damages that are essentially indefinite.

The other points in this cause we feel compelled to dispose of in a few brief propositions:

A railroad company carrying passengers cannot allege that a passenger is in fault in obeying specific instructions of the conductor, instead of the general directions of which he has been informed.

Assuming that a public company of carriers may contract for other exemptions from liability than those allowed by law, still such a contract will not exempt from liability for gross negligence.

A regulation by which a passenger with live stock on the freight train is required to remain on the cars which contain his stock, is not so transgressed by his being in another part of the train, when it is at rest, as to make him a contributor to his own injury by that train being run into by another.

Judgment affirmed.

## LACKAWANNA AND BLOOMSBURG RAILROAD COMPANY v. CHENEWITH.

*Supreme Court, Pennsylvania, October, 1866.*

[Reported in 52 Pa. St. 382.]

COLLISION OF TRAIN WITH CAR ON TRACK—FREIGHT CAR ATTACHED TO TRAIN DERAILED—RULES AND REGULATIONS—AGENT'S ACT—LIMITING LIABILITY—RAILROAD COMPANY LIABLE FOR PERSONAL INJURY. — In an action to recover damages for injuries sustained by plaintiff in a collision of a train with a cow on the track, whereby his freight car fell over into the canal and he was severely injured, it was *held*, that where the company's agents had attached plaintiff's freight car to a passenger train, contrary to company's rules, plaintiff agreeing to run all risks, the railroad company could not repudiate the acts of their agents, so as to free themselves from liability for negligence, on the ground of want of power in their agents.

ERROR to the Court of Common Pleas of Luzerne County.  
*Judgment affirmed.*

"This was an action on the case, commenced May 4th, 1864, by William L. Chenewith against the Lackawanna and Bloomsburg Railroad Company.

"The plaintiff resided in Carlisle, and was engaged in running a market car, and selling, marketing fruit, etc. On Saturday, about the 1st of October, 1860, he and John Harder were at

Kingston with their cars (Chenewith's loaded with apples), after the regular freight train had gone. The superintendent of the road was absent. Upon the request of Chenewith — after being told it was against instructions and the rules of the company, and he proposing that if his car was put on the passenger train, which had not then arrived, he would run all risks, and attend to the brakes on his car — some of the other agents agreed that he might attach to that train. Both cars were attached, Harder's to the passenger car, and Chenewith's to Harder's, and after the train had passed Berwick station, a cow was seen coming down a hill on the side of the track; the engineer whistled to put down brakes, but before the train could be stopped, the engine ran over her. Before the train had reached Berwick, Chenewith went into Harder's car, and when the engineer whistled to put down brakes, Chenewith was on the platform of the passenger car. He then got on to Harder's car, which was 'riding the sills,' and Chenewith fell off. Harder's car body fell over into the canal; Chenewith's car also went into the canal. He was found lying between the two cars, in the canal, severely injured. He also lost a large portion of his lading. There was evidence that on one side of the track, at the place of the disaster, was a high bank, with a fence at the top, except at the terminus of a street; on the other side was the canal, and at Berwick, a cattle guard; there was a comparatively slight curve there in the road. There was a watchman also employed on that part of the track.

"On the trial, no points were submitted. CONYNGHAM, P. J., after referring to the permission to attach the cars, charged the jury, amongst other things:

" '1. In this respect both parties were acting wrongfully, if the testimony be correct, and if, as they said, they thought the effect of it might endanger the passenger train and the passengers, it was grossly wrong on the part of the officers. I do not see, however, that the company can here repudiate the acts of their officers, so as to free themselves from all liability upon such ground, as the officers did attach the cars, and run them on their course up to the time of the difficulty.

" '2. I do not consider that the agreement to stand or bear all risks would free the company from responsibility if injury occurred to the plaintiff, by reason of negligence or want of ordinary care in the running of the train by the agents of the company, the

jury not finding any other concurrent negligence on the part of the plaintiff, except the permitting his cars to be attached to the train under the contract mentioned.

" '3. I do not consider, under the evidence, that the plaintiff was technically a passenger on that train, or that because he agreed, as is said by some of the defendant's witnesses, to brake his own car, he is to be considered an *employee* of the company, so that he cannot bring suit against them for damages under the circumstances claimed here. \* \* \* I am not ready to say that such a person is, by virtue of his employment in such capacity, without any obligation upon the part of the company to protect him against the negligence of its engineers or other officers.

" '4. It is for you, upon reviewing all the facts, to decide whether the *accident* was occasioned by the carelessness or negligence of the engineer upon the train, or the watchman upon the road, another officer of the company, by leading the engineer into the danger, through the putting up of his signal light of safety, when a proper examination might have enabled him to discover this cow upon the track, if she had been there any time.

" '5. When the trouble about the cow occurred, Mr. Harder says the plaintiff was on the back platform of the passenger car, from which he was suddenly thrown or fell off; he was not in his proper place; while the mere fact of his being upon a platform (a platform outside of the car being necessarily his proper location), would not rule the case against him, yet if by reason of his not being on his own car, handling or ready to handle the brake, which if done in due season, or for any other reason, you believe, as argued here, would have lessened the chance of injury from the striking of the cow by the car, and as to any claim for personal damage or injury to his person, if by his unauthorized change of place, as contended, he conduced to the danger of the injury, which the jury think, under the evidence, he might have escaped if he had been in his allotted situation, he must and should be considered as guilty himself of carelessness and negligence, conducive to the accident or injury.'

"The jury found for the plaintiff, \$3,000. The portions of the charge above mentioned were assigned for error."

S. WOODWARD and H. M. HOYT, for plaintiffs in error.

A. RICKETTS and C. P. HUMRICH, for defendant in error.

**Thompson, J.** — 1. The first assignment of error on the record is to the portion of the charge of the learned judge, in which he

holds that the agents of the company, as well as the plaintiffs, acted improperly in attaching freight cars to a passenger train, yet that the company could not repudiate the act so as to free itself from responsibility for negligence, on the grounds of want of power in the agent.

We think the court committed no error in this. The arrangement was made with parties having full power over the subject-matter, and to them the plaintiff was authorized to look, and was required to look to no other. When, therefore, they consented to hitch on his cars to the passenger train, even at his urgent solicitation—and we have not a particle of evidence that other inducements to do the act were held out, excepting freedom from responsibility as a consequence of the attachment—we must presume that it was done with a view to the compensation to be paid, on the one hand, and the usual care to be exercised on the other. The argument, however, is, that the plaintiff was guilty of such a wrong in asking for and permitting his car to be attached, that whether the act contributed to the disaster or not, he is to be treated as a trespasser, and not entitled to any compensation for injuries not wilfully done him. This, we think, is not the law, unless in a case where the will of the agent is controlled and subverted by improper influences, he is induced to do that which is manifestly beyond the scope of his powers. That there was a regulation against running freight cars with passenger trains, may be admitted, although it was not properly proved; yet that neither proved that it might not be safely done, nor that if the company undertook to do it, they might lay aside the duty of care and commit such cases to the guardianship of chance. See *Powell v. Penn. R. R. Co.*, 8 Casey, 414 (1). The great overstatement of the efforts made to induce the defendants to take the plaintiff's cars is the main pillar upon which the argument against this portion of the charge is constructed. Fairly stated, the facts were that the plaintiff and another were desirous

1. In *POWELL v. PENNSYLVANIA R. R. Co.*, 8 Casey (32 Pa. St.), 414 (1859), it was held that "if a railroad company, employed in the transportation of live stock, permit straw or other combustible materials to be used on the cars, and a fire originates thereupon, by which the animals are injured, it is such negligence as will

render them liable for the loss sustained. A contract exonerating the company from all claims which may arise for injury to the stock whilst in the cars of the company, does not exonerate them from the consequences of negligence in the performance of their duty as common carriers." Judgment for defendants reversed.



to get to Carlisle by a certain day, and urged to be taken on the train by the company, as they had missed connecting with the freight train. The conductor and freight agent considered of the matter; inquired into the capacity of the cars to run with passenger cars; made up their minds to take them on their train, on a promise not to be held answerable for any injury resulting from the arrangement. Was the plaintiff put outside the protection of the law because he trusted to their judgment to do an act within their power to do, and especially when the act itself is not at all implicated in the disaster? *Little Schuylkill R. R. Co. v. Norton*, 12 Harris, 465, 470 (1), gives no support to such a doctrine. It was well decided on its own facts, and in substance presented the case of an authority given, or claimed to have been given, to obstruct or imminently endanger by an obstruction of the track. No sane man could suppose the agent of a railroad company had power to give any such authority, and hence a reliance upon it was an act of folly, which the law would not compensate. It was palpable to the "outward sense" that such obstruction was unlawful. Not so in this case. The regulations which controlled, among the operators of the company, were against it, but regulations for convenience may be, and oftentimes are suspended or modified, in obedience to certain exigencies, by those in charge of the operations. When this is done and no evil results, no harm is done. When the contrary is the case, the only rule to apply is to give all effect to the consequences flowing from the fact, and no more. Here it is not

I. In *LITTLE SCHUYLKILL NAVIGATION R. R. CO. & COAL CO. v. NORTON*, 12 Harris (24 Pa. St.), 465 (1855), the syllabus states the case as follows: "(1) Where injury is the result of mutual and concurring negligence in the parties, no action for damages will lie. (2) A railroad being by law a public highway, neither its superintendent nor the company itself has the right to permit its obstruction. (3) Where a person places himself on the track of a railroad, he can claim no damages, except for wanton injury, and not from injury sustained in the pursuit of the company's lawful business in the ordinary manner, even though the negligence of the company's agent con-

tributed to the result. (4) The plaintiff, in the employ of a contractor with the railroad company owning the road, fastened upon the railroad a machine for sawing wood, and whilst there was injured by a train of another company, having a right by contract to use the track. It was held that though he was upon the track by the authority of the superintendent of the company owning the road, he could not recover against the other company for the injury sustained, even though the conductor of the train previously knew of the machine being on the track, and was guilty of negligence on the occasion." Judgment for plaintiff for \$1,600 reversed.

pretended that these freight cars, the plaintiff's and Harder's, were the cause of running over the cow in the road, and it cannot be denied that that was the immediate or proximate cause of the injury. In all cases like this, the maxim, "*proxima causa non remota spectatur*" rules, and it must rule here, unless the unlawfulness of the plaintiff's car and himself on the road be established. We think this cannot be asserted by the company under the facts they have given in evidence, and we think there was no error in this part of the charge.

It has been suggested that if the car had not been attached, the plaintiff would not have been injured. Doubtless this is true, and it is true of every injury. In all cases if the party injured had been absent, it is presumable he would not have been injured by the agency operating. The voluntary presence of the traveler, if not wrongful, is so much a matter of individual choice, that its propriety is never an element to be inquired into in claiming or resisting damages for injury. People have a right to travel when they please, and will be compensated for injuries if occasioned by the negligence of those engaged in transporting them, if they have not contributed to the immediate disaster by their own negligence, whatever might be said against the propriety of their journeying. It is no answer to the plaintiff's claim, therefore, to argue that if he had not had his cars attached and been present, he would not have been injured. This was manifestly not the *proximate cause* of the injury, and not to be considered, unless it can be shown that he was a trespasser in being on the train at the time. This he was not; for he was there by permission and under the contract of parties competent to give him authority to be there. His right to damages, therefore, could only be rested upon an inquiry into the question of whose was the immediate, not the remote cause of the injury. In noticing another assignment of error, we will be brought directly to inquire whether the case was properly dealt with on this ground, and will not further discuss the point here. So far we discover no error in the charge.

2. Nor do we think the second assignment has been sustained. The fair interpretation of the agreement of the plaintiff is, that if the agent of the defendant attached his car to the passenger train he was to assume all the risk of that act; he did not assume the risk of negligence on their part, nor could they contract for exemption on account of it. *Powell v. Penn. R. R. Co.*, 8

Casey, 414 (1). The position taken by the learned judge and noticed above, having placed the case before the jury on its true grounds, in our opinion, namely, on the point of negligence, and not of authority in the agents to engage to transport the plaintiff and his cars, his remark that the plaintiff was entitled to a verdict if the defendant's negligence was the sole cause of the disaster, was entirely proper. Why speculate about the supposed dangerous position assumed by the plaintiff, if no danger resulted from it? Was he to become an outlaw for assuming what proved to be no risk, and so to forfeit his right when he was blameless? I know of no law to justify such a position.

3. In *Lockhart et al. v. Lichtenthaler*, 10 Wright, 151 (2), we held that a person in charge of a private car, and acting on it as brakeman, was not a servant of the company, so as to preclude his widow from recovering for the loss of his life by the negligence of the servants of the road. Strictly a passenger he was not, nor was he a servant of the company, neither earning wages from it nor bound to obey its orders, excepting in regard to the property especially in his charge. We held him entitled to the rights of a passenger, so far as injury to him was concerned, and that case rules the present in this particular; nothing more is needed on this point to show that there was no error in this portion of the charge.

4. To the portion of the charge embraced in the fourth assignment of error, the objection seems to be that it referred the question of negligence alleged against the company to the jury without evidence. There was no error in this reference of the question to the jury, unless, indeed, there was not sufficient evidence of negligence to go to the jury. But there was evidence on this point, unless the passenger was bound to take the risk of cattle on the track, and the company were not. Although a railroad may not be bound to fence its track against trespassing cattle, it is well settled that as between it and its passengers, it must take the risk of injury to them from such cause; and it is no answer to a claim for injury for such a cause, that the defendant was not bound to fence, or that cattle were on their track trespassing without their agency or knowledge. Their being there at the time of an accident, always raises a question of negligence or care; and whether negligence is imputable to the company, or

1. See abstract of this case, page 559,  
*ante*.

2. See abstract of this case, page 523,  
*ante*.

whether they have exercised due care to guard against obstruction from some such cause, is always and only determinable by the jury.

In this case there was an omission to fence at the mouth or end of a particular street. Near that was a watchman's station. It was a pertinent inquiry, therefore, whether there was negligence in the company in not fencing at the point mentioned, or whether the fault lay with the watchman — or either. If it lay with one or both, the plaintiff's case was clearly made out without his agency in it. And of this the jury had been instructed to inquire, in a previous part of the charge. These facts most certainly committed the case to the jury, and in submitting them the court committed no error.

5. As we understand the learned judge, he charged that the fact that the plaintiff, at the moment the accident occurred, was on the rear platform of the last passenger car, did not necessarily carry the case against him; and he gave his views of the law on this point thus: "Yet, if by reason of his not being on his own car, and handling or ready to handle his brake, which if done in due season, or for any other reason, you believe, as argued here, would have lessened the chance of injury from striking the cow by the cars; and as to any claim for personal damage or injury to his person, if by the unauthorized change of place, as contended, he conduced to the danger, or the injury, which the jury think under the evidence, he might have escaped if he had been in his allotted situation, he must and should be considered as guilty himself of carelessness and negligence, conducive to the accident or injury."

The complaint that the charge lacks perspicuity and is ambiguous, is to some extent just. But the defendant should have provided against this, by asking for instruction better suited to the case. If the counsel chose to withdraw their points, they assumed the very risk of which they complain. This, perhaps, is enough to say about the complaint of mere ambiguity. If the judge had said nothing in respect to the matter here involved, in the absence of any request to charge in a particular way, we would not reverse, as we have often said. By failing to pray instructions, we must infer that the party thought it best to risk what might be left unsaid, rather than call for special instructions. If he is injured by omitting to do so, it is his own error, which we do not sit to correct. But if from the language used by the judge,

either on account of ambiguity or want of perspicuity, there is good reason to believe the jury have been misled as to the case, we ought to reverse. Error from such a source is not less pernicious than positive error from any other. The jury are entitled to reasonably clear and comprehensive instructions, whenever any ought to be given, and when they fall so far short of this as to induce a well-grounded belief of misapprehension on part of the jury, this is generally sufficient to call for a reversal.

But the instructions embraced in this assignment of error, though involved, were such, we think, as could be well understood by the jury. We have no good reason to suppose they were not. They assert that the plaintiff at the time of the accident was not in his proper place, and the fact was left to the jury to say whether this circumstance increased the danger of contact by the train with the cow, by the omission of the plaintiff to handle his brake; and whether his own injury was the result of his unauthorized change of position or conduced to produce it, with a sufficiently clear direction that, if these facts were affirmatively found, the negligence was established against the plaintiff, and he would not be entitled to recover. This, we think, the jury could not fail to understand to be the meaning of the charge. If so, was it right in principle?

It is true, as argued for the plaintiff in error, that all the risk of an unauthorized change of position by the plaintiff on the train was assumed by him, and he was bound to abide by it. If it conduced to produce the injury, although the defendant may have been guilty of negligence at the same time, it would deprive him of all right to compensation, the fault being partly, at least, his own. But if it had no immediate connection whatever with the agency producing the injury, it would be strange justice to impute to it the like effect as if it had. That must necessarily be the conclusion in every case, if the question be not for the jury to say whether the acts of the plaintiff at the time have or have not been such as to have conduced to the injury. This is the rule, undoubtedly, in relation to passengers carried by rail, and was what the learned judge referred to the jury in the instruction complained of. If this was a proper inquiry for the jury, no error was committed in referring it to them. That this was the meaning we readily discover from his language, and I know of no rule by which we are bound to presume the jury did not understand it, and were misled by it. The result of their verdict

under the testimony falls far short of establishing this. The plaintiff in error avers, in his pleadings in this court, that there is error here, and he is bound to prove it. We must have more than suspicion of error upon which to base our action. If language has meaning comprehensible by us, we ought, it being untechnical, to presume it was comprehended in the same way by the jury, until the contrary be made to appear. That has not been done in the argument on this point.

The question whether the injury to the plaintiff resulted in any degree from his own acts or omissions, we think was plainly enough referred to the jury, with a sufficiently decided expression that if it were, he was not entitled to recover damages from the company; that if his negligence or misconduct contributed to his own injury, he must blame himself. This was the substance of the instruction, and there was nothing in it of which the defendant can complain.

The counsel for the plaintiff in error seems to confound the duty resting on a passenger with the law of contract, wherein, if the party do not comply, he is not entitled to the stipulated compensation. This is not correct to the full extent. Strictly, a passenger is only entitled to enjoy the seat he pays for. But if he be injured, while passing about in the car or standing up, without such acts contribute to the injury, he will be entitled to be compensated if it resulted from the negligence of the carriers, although he was out of his seat. If a passenger puts himself out of place, and in a place of danger, and is injured as the result, this is *damnum absque injuria*, and he cannot recover. This results rather from the law of carriers than from a breach of contract. If the contract were to control exclusively, then any breach would defeat the injured party without regard to the effect of contributory act. The duty to avoid risks or unauthorized acts, I admit, grows out of the contract relation between the carrier and passenger so far as to prevent a recovery on account of them; but not so far as to prevent a recovery where the fault is with the carrier, and the breach of duty arising out of the contract has not contributed to the injury. If no harm accrues from the breach of the duty, no blame or loss ought to follow. If the plaintiff did not contribute to his own injury by being where he was instead of where he had agreed to be at the moment of the accident, this would prove that the accident was entirely independent of his agency. This was for the jury to ascertain from the

evidence, and so it was submitted to them, and they have found the point in favor of the plaintiff and allowed damages. It may be they might, with better justice, have come to a different conclusion. But if so, which we do not assert, we cannot correct it. It is only with cases of clear error this court can properly interfere with the verdict, the jury being constitutional triers within their sphere as truly as the court.

These views do not, at least they are not intended to, impinge on the principles of the cases of *Penn. R. R. Co. v. McCloskey*, 11 Harris, 526, 12 Am. Neg. Cas. 548, *ante*; *McCully v. Clarke & Thaw*, 4 Wright, 406 (1), nor *Penn. R. R. Co. v. Aspell*, 11 Harris, 149, 6 Am. Neg. Cas. 225; indeed we accord fully with them so far as these principles are applicable to the circumstances of each case. The cause of the injury here was in no way attributable to the plaintiff; but still it was a question whether his acts or position at the moment of the accident contributed to his own injury. That was a question for the jury, and we see no error in the charge in submitting it to them.

Judgment affirmed.

**FIREMAN ON HOSE CARRIAGE STRUCK BY TRAIN AT CROSSING — FAILURE OF TRAVELER TO STOP, LOOK AND LISTEN — RAILROAD COMPANY NOT LIABLE. —** In *GREENWOOD v. PHILADELPHIA, WILMINGTON AND BALTIMORE R. R. CO.*, 124 Pa. St. 572 (1889), plaintiff riding at rear end of fire-hose carriage, struck by train as vehicle was going over railroad crossing, judgment on verdict directed for defendant, was affirmed, the statement in the official report showing the following facts:

1. In *McCULLY v. CLARKE & THAW*, 4 Wright (40 Pa. St.), 406 (1861), the syllabus to the report states the case as follows: "In an action on the case for damages against defendants for negligence in not caring for and extinguishing a pile of coal, which had taken fire, whereby the warehouse of the plaintiff, adjoining, with its contents, was burned up and destroyed, the proper subject of inquiry is, whether the defendants had used such care, caution and diligence as prudent and reasonable men would have exercised; and it is a question for the jury. Hence, it was not error in the court below to re-

fuse to instruct the jury that if they believed certain facts to be proved, of which evidence had been given, the defendants were guilty of negligence, as a matter of law, and that the plaintiff was entitled to recover. If the loss resulted from mutual negligence, the plaintiff could not recover, and this was also a question for the jury; therefore, where the evidence was conflicting, the court could not charge that there was no such negligence on the part of the plaintiff as would prevent his recovery." \* \* \* Judgment for defendants affirmed.

"At the trial on September 26, 1888, the essential facts appearing were as follows: In March, 1887, the plaintiff, for a short time, had been a member of a fire company in the city of Chester, and knew the line of the defendant company's road, crossing Welsh street, at a point one square above Fifth street. At about eleven o'clock at night on March 26, 1887, there was an alarm of fire, and the plaintiff, with another, jumped upon the steps at the rear end of a hose carriage. In that position he could not see over the seat in front, where the driver sat. The hose carriage was driven rapidly down Fifth street, for half a square, and then turned up Welsh, proceeding, without being checked, towards the railroad crossing. Though the plaintiff had control of the hose carriage, he gave no directions to the driver.

"As required by city ordinance, the defendant company maintained a pair of adjustable gate-bars at the crossing on Welsh street, one on each side of the line, which were let down on the approach of a train and bore a red light, indicating at night the position of the bars, as being up or down. On the night in question the working parts of the gateway were out of order and the bars elevated, without the red light upon them. There was an ordinance forbidding the approach of trains to crossings at a greater speed than five miles an hour. On the side of Welsh street towards which a train was approaching the street was built up with houses. There was evidence on the part of the plaintiff that no watchman was out at the crossing; that no bell was rung, and that the train approached at over ten miles an hour. As the hose carriage and its occupants crossed the track they were struck by a passing train and the plaintiff thrown beneath the cars, where his left foot and hand were so crushed that they had to be amputated.

"On the part of the defendant company evidence was introduced to show that the hose carriage was being driven at a headlong rate of speed on Welsh street; that the plaintiff was continuously ringing the carriage gong; that the working parts of the gate bars had been out of repair since the morning of that day, and as a substitute, a watchman was at the crossing, signaling with a lantern and white light, and in full view, for a distance of 300 feet; and the driver of the hose carriage admitted on the stand that he had seen the danger signal when he was 100 feet from the crossing, but thought that the gate tender ' had probably come out a minute before the train would come to the crossing; they generally do that, and I thought if that was the case I could probably get across before the train got there.'

" There were no points submitted and the court, CLAYTON, P. J., charged the jury:



" After carefully listening to all the evidence in the case before us, I am of opinion, as a matter of law, that the plaintiff has failed to make out a case sufficient to warrant or sustain a verdict in his favor. I hold that it is the duty of every traveler upon a public highway, crossed by a railroad, before attempting to cross the road, to stop, look and listen. If he hears no approaching train or sees none, then he may cross. Any traveler who neglects that duty is guilty of negligence, and when there is contributory negligence — when both parties are negligent — the law does not permit a recovery by either, as it does not pretend to measure the amount of negligence, so as to ascertain whether one party is more negligent than the other. The only question in my mind, when the first motion was made for a nonsuit, was whether the fact that the company had undertaken to erect safety gates at these crossings did not make it their duty to so guard the road as to relieve travelers from their duty of stopping, looking and listening; but, upon reflection, and after hearing all the evidence in the case, I am of opinion that that was intended as an additional safeguard of public travel, and not to relieve the traveler from any previous care for his own protection. The duty still remains, although the gates be there. Although extra precautions are taken by the railroad, the duty still exists for every traveler in crossing the railroad to stop, look and listen. If he does not do that, he cannot recover. It will, therefore, be your duty to find a verdict for the defendant, and if the court is wrong the plaintiff will have his redress either by a new trial, granted by this court, or by a reversal of this judgment by the Supreme Court. You are, therefore, directed to render a verdict for the defendant.'

" The jury returned a verdict for the defendant, as directed. Judgment having been entered, the plaintiff took this writ, assigning the instructions to the jury as error." (J. B. HINKSON and W. B. BROOMALL (J. H. HINKSON, with them), appeared for plaintiff in error; WM. WARD, for defendant in error). Judgment affirmed. Opinion by PAXSON, CH. J.

#### NOTES OF PENNSYLVANIA CASES RELATING TO COLLISIONS AT CROSSINGS, ACCIDENTS ON TRACK, COLLISIONS WITH STREET CARS, AND RUN-OVER CASES.

Among the numerous Pennsylvania cases arising out of Accidents to Persons Driving or Walking at Crossings, Collisions with Street Cars, Run-over Accidents, etc. (other than those reported in this volume of AM. NEG. CAS.), are the following:

**Rule of stop, look and listen — Steam railroad tracks.**

In *Pennsylvania* a person is required to stop as well as to look and listen before crossing a railroad track, but this is not an invariable rule in other States, it being generally for the jury to determine from the facts whether plaintiff should have stopped as well as have looked and listened.

In *GRAY v. PENNSYLVANIA R. R. CO.*, 172 Pa. St. 383, 386 (1896), the court (per Mr. JUSTICE DEAN), said, on the question of duty of travelers at crossings: "The law, as gathered from our numerous cases on the subject, is so concisely stated by our Brother Mitchell in the very late case of *ELY v. PITTSBURG, C. C. & ST. L. R'Y CO.*, 158 Pa. St. 233, 236 (1893), that we repeat it: 'The cases beginning with *North Penn. R. R. Co. v. Heileman*, 49 Pa. St. 60 (1865), and *Penn. R. R. Co. v. Beale*, 73 Pa. St. 504 (1873), have established not only the rule that the traveler about to cross a railroad track must stop, look and listen, as an absolute and unbending rule of law founded in public policy for the protection of passengers in railroad trains, as much as of travelers on the common highways, but also that such stopping, looking and listening must not be merely nominal or perfunctory, but substantial, careful and adapted in good faith for the accomplishment of the end in view. Hence the necessary corollaries of the rule \* \* \* that the traveler must stop and look where he can see, and he will not be allowed to say that he did so when the circumstances make it plain that the proper exercise of his senses must have shown him the danger. These principles are settled beyond question, but the application of them to the infinite variety of circumstances and evidence in accident cases is not always easy. All that this court can do is to lay down the general rules, and to say that where the facts are uncontested, or the inference of negligence the only one that can be drawn, the court must pronounce the result as matter of law; but where the facts are in dispute, or the inference of them open to debate, they must go to the jury. This is the result of all the cases. \* \* \* This rule applies to persons walking, equally as to persons driving.'"

"To the same effect is a still later case, heard at Pittsburgh, opinion by our Brother WILLIAMS, *DAVIDSON v. LAKE SHORE & MICHIGAN SO. R'Y CO.*, 171 Pa. St. 522 (1895). In this case the distinction between cases which must go to the jury and those which should not, is stated as clearly as it is possible to state it."

**Driving across track — Collisions at crossings.**

*NORTH PENNSYLVANIA R. R. CO. v. HEILEMAN*, 49 Pa. St. 60 (1865), plaintiff, while driving across track, injured in collision with train at

crossing; judgment for plaintiff reversed for erroneous instruction as to duty of traveler; it being held that it is the duty of a traveler, when approaching the intersection of a railroad with a common highway, to look out for approaching trains and engines, and failure to take this precaution is negligence.

See *REEVES v. DELAWARE & LACKAWANNA R. R. Co.*, 6 Casey, 454, 464 (1858,) cattle injured at crossing; judgment for defendant reversed.

See also *PENNSYLVANIA R. R. Co. v. OGIER*, 11. Casey, 60 (1860), collision between wagon and train at crossing and person driving killed; judgment for plaintiff for \$10,250 affirmed.

*PITTSBURG, FORT WAYNE & CHICAGO R. R. Co. v. EVANS*, 53 Pa. St. 250 (1866), collision between wagon and train at crossing; judgment for plaintiff for \$5,500 reversed for failure to properly instruct on negligence of parties and insufficiency of finding on special verdict.

*PENNSYLVANIA R. R. Co. v. WEBER*, 72 Pa. St. 27 (1872), plaintiff's intestate driving across track struck by train at crossing; judgment for plaintiff for \$2,500 reversed for erroneous admission of certain evidence.

*PENNSYLVANIA R. R. Co. v. BEALE*, 73 Pa. St. 504 (1873), plaintiff's intestate struck by engine while driving across track; judgment for plaintiff for \$1,000 reversed on the ground of contributory negligence. "If the traveler cannot see the track by looking out, whether from fog or other cause, he should get out, and, if necessary, lead his horse and wagon." \* \* \* "Failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but is negligence *per se*, and a question for the court."

*PENNSYLVANIA R. R. Co. v. ACKERMAN*, 74 Pa. St. 265 (1873), plaintiff's horses and wagon struck and injured by collision with train at crossing; contributory negligence for jury; judgment for plaintiff for \$580 affirmed. (The BEALE case, 73 Pa. St. 504, distinguished; see preceding paragraph.)

*GERETY v. PHILADELPHIA, WILMINGTON & BALTIMORE R. R. Co.*, 81 Pa. St. 274 (1876), plaintiff's intestate attempting to drive across track, near approach of train being visible, struck and killed by train; contributory negligence; nonsuit affirmed.

*CENTRAL R. R. Co. of NEW JERSEY v. FELLER*, 84 Pa. St. 226 (1877), plaintiff's intestate, familiar with crossing, driving across track without stopping to look for train, struck and killed by train; contributory negligence; judgment for plaintiffs for \$1,840 reversed.

*READING & COLUMBIA R. R. Co. v. RITCHIE*, 102 Pa. St. 425 (1883), plaintiff's intestate killed while attempting to cross railroad track

in covered carriage; failure to stop, look and listen; contributory negligence; judgment for plaintiff for \$5,000 reversed.

SCHUM *v.* PENNSYLVANIA R. R. Co., 107 Pa. St. 8 (1884), collision of wagon and train at crossing; person driving killed; nonsuit reversed; the evidence justifying submission to jury; where there is no evidence that person stopped, looked or listened at crossing, the presumption is that he did, but this may be rebutted.

LAKE SHORE & MICHIGAN SOUTHERN R'Y Co. *v.* FRANZ, 127 Pa. St. 297 (1889), collision between wagon and train at crossing; judgment for plaintiff for \$9,000 affirmed.

See also MCNEAL *v.* PITTSBURG & WESTERN R'Y Co., 131 Pa. St. 184 (1889), collision at crossing; judgment of nonsuit reversed.

ELLIS *v.* LAKE SHORE & MICHIGAN SOUTHERN R'Y Co., 138 Pa. St. 506 (1890), collision between wagon and train at crossing; judgment for plaintiff for \$7,900 affirmed.

GRONER *v.* DELAWARE & HUDSON CANAL Co., 153 Pa. St. 390 (1893), collision between coal cars and wagon at crossing; judgment for plaintiff for \$700 affirmed.

NEWHARD *v.* PENNSYLVANIA R. R. Co., 153 Pa. St. 417 (1893), collision between wagon and train at grade crossing; judgment for defendant affirmed.

WHITMAN *v.* PENNSYLVANIA R. R. Co., 156 Pa. St. 175 (1893), collision between wagon and train at crossing; judgment for defendant reversed; question whether plaintiff stopped, looked and listened, for jury.

SMITH *v.* BALTIMORE & OHIO R. R. Co., 158 Pa. St. 82 (1893), plaintiff riding in wagon at invitation of owner injured in collision at crossing; judgment for plaintiff affirmed.

ELY *v.* PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS R'Y Co., 158 Pa. St. 233 (1893), collision between vehicle and train at crossing; judgment for plaintiff for \$2,000 affirmed.

LINK *v.* PHILADELPHIA & READING R. R. Co., 165 Pa. St. 75 (1895), person killed while driving over public crossing; judgment for plaintiff for \$5,000 affirmed.

Another action was also brought in the LINK case (165 Pa. St. 75) for damages for injuries to vehicle, and judgment in that case for \$367.83 was affirmed.

GANGAWER *v.* PHILADELPHIA & READING R. R. Co., 168 Pa. St. 265 (1895), collision between wagon and train at grade crossing, and person driving killed; contributory negligence, the evidence showing that the accident might have been avoided if the deceased had looked when he was within fifteen or twenty feet from the track; nonsuit affirmed.

BEYNON *v.* PENNSYLVANIA R. R. Co., 168 Pa. St. 642 (1895), collision between wagon and train at crossing and person driving killed; nonsuit affirmed, although court held that it was a close case.

In DAVIDSON *v.* LAKE SHORE & MICHIGAN SOUTHERN R'y Co., 171 Pa. St. 522 (1895), collision between wagon and train at crossing and person driving injured, nonsuit was reversed, question of negligence being for jury. (The court cited *Mulherrin v. Del., Lack. & W. R. R. Co.*, 81 Pa. St. 366; *Moore v. Phila., Wilm. & Balt. R. R. Co.*, 108 Pa. St. 349; *Marland v. R. R. Co.*, 123 Pa. St. 487; *R. R. Co. v. Mooney*, 126 Pa. St. 244, and *Connerton v. Del. & H. Canal Co.*, 169 Pa. St. 339, cases of persons struck by trains on the instant of stepping on the track; *Myers v. B. & O. R. R. Co.*, 150 Pa. St. 386; *McNeal v. Pittsb. & W. R. R. Co.*, 131 Pa. St. 184; *Ellis v. Lake Shore R. R. Co.*, 138 Pa. St. 506; *Smith v. B. & O. R. R. Co.*, 158 Pa. St. 82; *Link v. Phila. & Reading R. R. Co.*, 165 Pa. St. 75; *Whitman v. Penn. R. R. Co.*, 156 Pa. St. 175, driving across track; which cases will be found noted in this volume of AM. NEG. CAS.)

HUGHES *v.* DELAWARE & HUDSON CANAL Co., 176 Pa. St. 254 (1896), collision between freight train and wagon at crossing and plaintiff's husband killed; judgment for plaintiff for \$9,499.50 reversed on the ground that nonsuit should have been granted, the evidence showing contributory negligence, and judgment directed for defendant.

ROBERTS *v.* DELAWARE & HUDSON CANAL Co., 177 Pa. St. 183 (1896), plaintiff's husband killed while driving across track at public street crossing; question of negligence properly for jury; judgment for plaintiff for \$8,302.88, affirmed.

#### **Horses frightened at crossings, etc.**

##### *Noise of train whistle at drawbridge.*

PHILADELPHIA, WILMINGTON & BALTIMORE R. R. Co. *v.* STINGER, 78 Pa. St. 219 (1875), plaintiff's horse, which he was driving, frightened by noise of train at drawbridge, running away, upsetting wagon and injuring plaintiff; judgment for plaintiff for \$1,600 reversed; blowing of whistle in ordinary manner not negligence.

##### *Noise of coupling cars at crossing.*

PENNSYLVANIA R. R. Co. *v.* HORST, 110 Pa. St. 226 (1885), cars blocking crossing, and plaintiff being beckoned by a trainman, drove across, but the noise of coupling cars frightened the horse and plaintiff's wife was thrown from wagon and injured; judgment for plaintiff for \$500, affirmed.

*Flagman waving lantern in front of horse.*

FLOYD *v.* PHILADELPHIA & READING R. R. CO., 162 Pa. St. 29 (1894), plaintiff's horse, which she was driving, becoming frightened at act of flagman at crossing running in front of horse, waving lantern to stop carriage going across track in order to avoid accident; verdict and judgment for defendant affirmed; *held*, that "an act done upon a sudden emergency when life is apparently in peril, is not negligent, even though it is mistaken."

*Hand car at crossing.*

PLUMMER *v.* N. Y. & HUDSON RIVER R. R. CO., 168 Pa. St. 62 (1895), plaintiff's horse frightened at hand car, which approached crossing as plaintiff was about to drive across, upsetting wagon and injuring plaintiff; nonsuit affirmed, no evidence of negligence on part of railroad company being shown.

*Frightened by electric car.*

YINGST *v.* LEBANON & ANNVILLE ST. R'y CO., 167 Pa. St. 438 (1895), plaintiff's wagon overturned and plaintiff injured by horse shying at electric car, which was approaching; judgment for plaintiff for \$1,000 reversed, there being nothing to show defendant was negligent in running car at great speed; *held*, that "as the right of the defendant company to run its cars on its tracks is fully equal to the right of the plaintiff to ride in a wagon on the street, the mere fact that the horse took fright at the sight of the car confers no right of action whatever against the defendant," (citing *Hazel v. Passenger R'y Co.*, 132 Pa. St. 96; *Piolett v. Simmers*, 106 Pa. St. 95; *Pittsburg St. R'y Co. v. Taylor*, 104 Pa. St. 306).

**Looking and listening — Street-railway tracks.**

It is the duty of one about to cross a street railway to look as he approaches the track, and, if there is any obstruction, to listen, and his neglect to do so is negligence *per se*; and that this is an unbending rule, to be observed at all times and under all circumstances. In the case of steam railroads, a question sometimes arises as to the proper place to stop, look and listen, but no such question arises in the case of city railways. If the citizen looks just before he crosses, he avoids all danger of accidents.

EHRLSMAN *v.* EAST HARRISBURG CITY PASSENGER R'y CO., 150 Pa. St. 180 (1892), collision between wagon and street car; judgment for plaintiff reversed.

WHEELAHAN *v.* PHILADELPHIA TRACTION CO., 150 Pa. St. 187 (1892), collision between wagon and street car; judgment for plaintiff reversed.

OMSLAER *v.* PITTSBURG & BIRMINGHAM TRACTION Co., 168 Pa. St. 519 (1895), collision between wagon and street car; failure to stop, look or listen; nonsuit affirmed.

In the OMSLAER case, the court said: "The rule of 'stop, look and listen,' before attempting to cross the tracks of a steam railroad is inflexible, and nonobservance of it is negligence *per se*. So much of this rule as requires a person about to cross the tracks of a steam railroad to 'look and listen' to discover whether a train is approaching is applicable to the crossing of a street railway operated by cable or electricity. \* \* \* There is no settled rule which demands that he shall *stop* before crossing a street railway, nor does it appear desirable that there should be." \* \* \* But circumstances may require a person to do so in the exercise of ordinary care.

#### **Collisions between vehicles and street cars.**

See the cases referred to in the preceding paragraphs, relating to collisions on street railway tracks.

CARSON *v.* FEDERAL STREET & PLEASANT VALLEY R'y Co., 147 Pa. St. 219 (1892), collision between street car and wagon; damage to property; contributory negligence of driver of wagon driving on track at street crossing, without looking for cars; judgment for plaintiff reversed.

GILMORE *v.* FEDERAL STREET & PLEASANT VALLEY PASSENGER R'y Co., 153 Pa. St. 31 (1893), horse and wagon left unguarded upon street-railway track, struck by street car; judgment for plaintiff reversed.

CONNOR *v.* ELECTRIC TRACTION Co., 173 Pa. St. 602 (1896), collision between wagon and trolley car, in which plaintiff's husband was killed; judgment for plaintiff for \$5,000 affirmed.

THOMAS *v.* CITIZENS' PASSENGER R'y Co., 132 Pa. St. 504 (1890), collision between street car and carriage; judgment for plaintiff for \$169.75, reversed; failure to show negligence of defendant.

#### *Defective car track.*

In GILTON *v.* HESTONVILLE, MANTUA & FAIRMOUNT PASSENGER R'y Co., 166 Pa. St. 460 (1895), it appeared that plaintiff's injuries were caused by the rim of the wheel of his wagon being caught by the end of the defendant company's rail, which had become worn and split, and he was thrown out; that the car tracks for two squares from the place of the accident were in dangerous condition to persons driving, because of the rails being worn and many of them insecurely fastened or entirely loose; that the rail which caused the injury was so worn that it would not hold the spikes and

appeared to have been in that condition for some time; that the defects were apparent and would have been observed by any one supervising the track. The court held that the case was one for the jury and that a nonsuit had been improperly granted; that a street-railway company is bound to know that use and climatic influence will produce defects in rails, and is bound to make continued inspection.

**Pedestrians injured at crossings.**

*Accidents at station.*

IN *CARROLL v. PENNSYLVANIA R. R. CO.*, 12 W. N. C. (Pa.) 348 (1882), judgment of nonsuit was affirmed on the following facts: It appeared that plaintiff came out of the waiting room of the defendant's depot, where he had gone to buy a ticket, intending to cross the tracks running through the depot. The depot fronted south and two tracks passed through it, along which was a platform, two steps above the ground. Plaintiff waited for a freight train to pass eastward on south track, and then looked for a train on the north track, but seeing none, he walked slowly to the crossing at west end of depot and when on the crossing turned to the left and stepped on the track, when he was struck by an engine going westward and his foot was injured. It was held that the injury was caused solely by plaintiff's own gross carelessness.

*PENNSYLVANIA R. R. CO. v. HENDERSON*, 43 Pa. St. 449 (1862), plaintiff's intestate, a drover, while waiting on platform for a train to pass, struck and killed by a fast passenger train; judgment for plaintiff for \$3,250 reversed for erroneous instruction as to care required of injured party.

*PENNSYLVANIA R. R. CO. v. BELL*, 122 Pa. St. 58 (1888), person walking to edge of platform, warned of approaching train, struck by engine; contributory negligence; judgment for plaintiff reversed.

*IREY v. PENNSYLVANIA R. R. CO.*, 132 Pa. St. 563 (1890), person running across track at station, struck and killed by train; failure to stop, look or listen; contributory negligence; nonsuit affirmed.

*Accidents at crossings.*

*DELAWARE, LACKAWANNA & WESTERN R. R. CO. v. CADOW*, 120 Pa. St. 559 (1888), plaintiff, a cripple, leaving safe path along sidewalk, and going over crossing in night-time, condition not being known to him, and falling over planking; judgment for \$4,500 reversed.

*MARLAND v. PITTSBURG & LAKE ERIE R. R. CO.*, 123 Pa. St. 487 (1888), person, a minor, stepping on a railroad track and struck and injured by train; failure to look and listen; nonsuit affirmed.



FISHER *v.* MONONGAHELA CONNECTING R'Y CO., 131 Fa. St. 292 (1889), person struck by freight cars at crossing; judgment of nonsuit reversed.

CLEARY *v.* PHILADELPHIA & READING R. R. CO., 140 Pa. St. 19 (1891), pedestrian killed by train at crossing; nonsuit affirmed; contributory negligence.

OBERDORFER *v.* PHILADELPHIA & READING R. R. CO., 149 Pa. St. 6 (1892), plaintiff's intestate attempting to cross in front of approaching train, although warned not to do so by flagman, struck and killed by train; contributory negligence; nonsuit affirmed.

CHILDS *v.* PENNSYLVANIA R. R. CO., 150 Pa. St. 73 (1892), plaintiff's intestate killed at crossing; failure to signal; judgment for plaintiff for \$5,000 affirmed.

MYERS *v.* BALTIMORE & OHIO R. R. CO., 150 Pa. St. 386 (1892), pedestrian struck and injured by train at crossing; failure to stop, look and listen; judgment for plaintiff reversed.

ARNOLD *v.* PHILADELPHIA & READING R. R. CO., 161 Pa. St. 1 (1894), young woman, somewhat deaf, while attempting to cross railroad track at street crossing, struck by train; nonsuit reversed, the evidence being conflicting, was for the jury.

MATTHEWS *v.* PHILADELPHIA & READING R. R. CO., 161 Pa. St. 28 (1894), plaintiff's husband killed by train while walking across track at point short distance from safety gates at public crossing; nonsuit affirmed.

SHEEHAN *v.* PHILADELPHIA & READING R. R. CO., 166 Pa. St. 354 (1895), young man struck by train while attempting to cross track, the gates at crossing being down and a train approaching; failure to stop, look and listen; contributory negligence; nonsuit affirmed.

HAVERSTICK *v.* PENNSYLVANIA R. R. CO., 171 Pa. St. 101 (1895), plaintiff's husband killed by train while crossing track; judgment for plaintiff for \$15,000 affirmed.

GRAY *v.* PENNSYLVANIA R. R. CO., 172 Pa. St. 383 (1896), plaintiff's husband killed by train, while crossing track; judgment for plaintiff for \$5,000 affirmed.

PHILPOTT *v.* PENNSYLVANIA R. R. CO., 175 Pa. St. 570 (1896), plaintiff's intestate killed by engine, while crossing track; judgment for plaintiff for \$7,000 affirmed.

*Struck by coal car on sidewalk.*

NORTH PENNSYLVANIA R. R. CO. *v.* ROBINSON, 44 Pa. St. 175 (1863); plaintiff's intestate struck by coal car as he was passing along sidewalk where track leading into defendant's yard crosses it; judgment for plaintiff for \$1,600 affirmed.

*Struck by train in freight yard.*

BALTIMORE & OHIO R. R. CO. *v.* COLVIN, 118 Pa. St. 230 (1888), teamster employed by shipper, hauling freight to car of defendant, driving on street at freight station, crossed by the tracks of defendant at point within the defendant's yard, struck by train; judgment for plaintiff reversed, the company not being liable under the statute for the negligent act of flagman at crossing; also error to refuse to charge on question of contributory negligence.

*Accidents on street-car track.*

WARNER *v.* PEOPLE'S STREET R'Y CO., 141 Pa. St. 615 (1891), woman, eighteen years old, walking in a cut through a snowdrift, along defendant's track, run down by street car; contributory negligence; failure to look for car; judgment for plaintiff reversed.

IN PATTON *v.* PHILADELPHIA TRACTION CO., 132 Pa. St. 76 (1890), where the driver of a dray stopped it at what he thought was a safe distance from the car track, and while putting a blanket on his horse was struck by defendant's electric car, it was *held* that as the driver of the car thought he had room enough to pass plaintiff and his dray, the accident was merely caused both by plaintiff and the driver miscalculating as to distance, and a nonsuit was properly entered.

IN KESTNER *v.* PITTSBURG & BIRMINGHAM TRACTION CO., 158 Pa. St. 422 (1893), an action for damages for injury to plaintiff, occasioned by defendant's electric car colliding with a wagon in plaintiff's charge, plaintiff testified that seeing the car approaching, he signaled the driver to stop, and started to unhitch the horse to get him out of the way of the car, and whilst so doing, the car struck the wagon, frightening the horse, which turned around and injured plaintiff. *Held*, that there was sufficient evidence of want of proper care to submit to the jury. Judgment for plaintiff for \$656 affirmed.

*Pedestrians struck by wagons.*

GOSHORN *v.* SMITH, 92 Pa. St. 435 (1880), plaintiff, while trying to start balky horse attached to street car, in stepping back to avoid injury, struck by defendant's wagon; no evidence of negligence against defendant; judgment for plaintiff reversed.

BAKER *v.* FEHR, 97 Pa. St. 70 (1881), plaintiff's intestate, having alighted from a street car, attempting to get package from front platform, struck by defendant's ice wagon; judgment for plaintiff reversed, negligence of defendant not being shown.

SCHMIDT *v.* MCGILL, 120 Pa. St. 405 (1888), plaintiff struck by beer wagon at street crossing; judgment for \$3,000 affirmed.

*Carriage colliding with and horse killed on highway.*

**WATERS v. WING**, 59 Pa. St. 211 (1868), plaintiff's horse killed by shaft of defendant's carriage running into him on public highway; judgment for plaintiff reversed; defendant's request to charge "that the defendant had a right to be on the public highway, and if the jury believe that at the time of the alleged accident he was traveling in an ordinary manner, he is not liable for an injury resulting from such use of the public throughfare," should have been granted.

**COLLISION AT CROSSING — PERSON DRIVING KILLED — ERRONEOUS NONSUIT.** — In **PRUE, ADM'R v. NEW YORK, PROVIDENCE & BOSTON R. R. CO.**, 18 R. I. 360 (1893), plaintiff's intestate killed while driving over crossing, plaintiff's petition for new trial was granted, the syllabus to the official report stating the case as follows: "B. was killed at a railroad crossing while driving his team over it. A train was approaching from each direction. The view of the track extended further in one direction than in the other. The electric signal bells sounded. B. seemed to be watching one train only. He was warned to stop, but did not understand English. The railroad gates were lowered, both behind and in front of him. In an action by B.'s administrator against the railroad company for causing B.'s death, it was held that a nonsuit was improperly granted."

**PERSON RIDING IN SLEIGH KILLED IN COLLISION WITH TRAIN AT CROSSING.** — In **WILSON, ADM'R v. NEW YORK, NEW HAVEN & HARTFORD R. R. CO.**, 18 R. I. 491 (1894), person riding in sleigh, a public conveyance, killed in collision with sleigh and train at crossing, it was *held* (as per syllabus to the official report), that where the declaration "merely charges negligence without setting forth in particular any act or omission of the defendant constituting negligence, it is demurrable." "If a railroad company voluntarily erects and maintains a gate at a highway crossing, the leaving open of such gate, when a train is approaching, is negligence." "Leaving the gate open amounts in law to an invitation to travelers on the highway to cross the track, in the sense that it is an implied assurance that the track can be safely crossed." Demurrer overruled and case remitted to Common Pleas for trial.

**WALKING ON RAILROAD TRACK AND STRUCK BY TRAIN — RINGING OF BELL NOT REQUIRED AT PLACE OTHER THAN CROSSING.** — In **O'DONNELL v. PROVIDENCE**

**& WORCESTER R. R. CO.**, 6 R. I. 211 (1859), where plaintiff, while walking on railroad track, was struck and injured by train, judgment for plaintiff for \$1,500 was reversed, and judgment, notwithstanding verdict for plaintiff, ordered for defendants. The syllabus states the case as follows: "The fourth section of the 'Act in relation to Railroads' (Dig. 1844, pp. 338, 339), giving an action to any one injured by the neglect of a railroad company to ring the bell upon their locomotive engine for the distance, at least, of eighty rods from the place where the railroad crosses any turnpike, highway or public way, upon the same level with the railroad, and to keep the same ringing until the engine shall have passed such turnpike or road, was exclusively designed for the benefit of persons crossing the turnpike, highway or public way on the level with the railroad; and hence, a person who is injured by the engine, while he is walking along the track of the railroad and not at any crossing, cannot recover damages against the railroad company for such injury, upon the ground that the injury was caused by their neglect to ring the bell upon their locomotive, as required by statute."

**DEAF MUTE KILLED WHILE CROSSING TRACK — CONTRIBUTORY NEGLIGENCE.** — In **ORMSBEE v. BOSTON & PROVIDENCE R. R. CORP.**, 14 R. I. 102 (1883), it appeared "that Paschal Ormsbee, plaintiff's husband and intestate, a deaf mute, was killed while attempting to cross the defendant's track at a public crossing in East Providence. At this crossing there was an unobstructed view of the track in both directions, for a long distance, from the approach on the west side where Ormsbee was; there was daylight at the time, and a gate was down on the east side, in plain view from the west side, but no stationary bell nor whistle were sounded, while the train was crossing, as required by statute. As a train was making a 'flying switch,' so called, the engine having passed the crossing towards the south and then backed towards it on another track, Ormsbee walked to and upon the track, 'bent forward, as an old man would walk, with his head bowed down, looking toward the engine,' as stated by the witnesses, who saw him. Without looking to the north, whence the cars were approaching, he was struck by the forward car and instantly killed. Upon this state of facts the defendant claimed that the plaintiff could not recover, because Ormsbee was guilty of negligence in not looking both ways before he stepped upon the track, and asked for such a ruling;" but the question was left to the jury. On appeal defendant's petition for new trial was granted.

*Run over by horse and sleigh — Obstruction in street — Proximate cause.*

In *LEE v. UNION R. R. Co.*, 12 R. I. 383 (1879), it appeared that plaintiff, who was walking along sidewalk, was knocked down and run over by a horse and sleigh, which was upset by an obstruction of ice and snow, piled in street by defendant company, whereby the horse attached to sleigh became frightened and ran against plaintiff. Defendant demurred to declaration on ground that the obstruction was not proximate cause of the injury, but demurrer was overruled, it being held that the accident happened by reason of such accumulation of ice and snow on the street.

*Infants injured.*

In *MORRISSEY v. PROVIDENCE & WORCESTER R. R. Co.*, 15 R. I. 271 (1886), where a child, about four years old, strayed from its home, wandered across railroad track and fell into trench filled with water, it was held that action could not be maintained, as the defendant company was not under any obligation to fence its tracks to prevent plaintiff getting on adjoining land, and demurrer to declaration sustained.

See *BISHOP v. UNION R. R. Co.*, 14 R. I. 314 (1894), 6 Am. Neg. Cas. 394, where boy, about six years old, was run over by street car.

In *ARMSTRONG v. NEW YORK, NEW HAVEN & HARTFORD R. R. Co.*, 20 R. I. 791 (1893), it was held that "acquiescence in the use of a passageway over a railroad for so long a time, that the railroad company may be presumed to have known and assented to such use, is all that is required to charge it with the duty of exercising reasonable care for the protection of persons passing over such way across its tracks," and demurrer to declaration in action for personal injuries sustained at crossing, overruled.

*Horse frightened — Obstruction on highway.*

In *BENNETT ET UX. v. LOVELL*, 12 R. I. 166 (1878), it appeared that the plaintiff and his wife were thrown from their wagon and injured in consequence of their horse taking fright from some tubing and machinery, which had been left upon the public highway by the defendant, who was carrying the same for the use of the city water works. The case had been twice submitted to a jury, and verdict rendered for plaintiff. On defendant's petition for new trial same was dismissed. It was held that the defendant should have taken precautions to warn persons traveling along highway of danger of obstruction.

*Animal on track.*

IN *TOWER v. PROVIDENCE & WORCESTER R. R. Co.*, 2 R. I. 404 (1853), it was held that "where a railroad company, not obliged by their charter to fence the road against adjoining lands, unless requested so to do by the owner, agreed with such owner that they should not fence the road against his lands, and a cow placed upon such lands having strayed upon the railroad, where it was killed by the passing of a train of cars, the owner of the cow, having contributed by his own fault in permitting the cow to pass upon the road to its destruction, was not entitled to damages for its loss; and the charge of the court that 'if the cow was killed by the neglect of the defendants to use ordinary care and skill in the common and ordinary use of the lands for railroad purposes, then the defendants would be liable to the owner for damages,' was erroneous. Judgment for plaintiff reversed and judgment ordered for defendant.

**COLLISION AT CROSSING — PERSON DRIVING INJURED — DUTY OF TRAVELER.** — In *ZEIGLER v. NORTHEASTERN R. R. CO.*, 5 S. C. 221 (1873), collision between wagon and train at crossing, whereby wagon and driver were injured, judgment for plaintiff was reversed, the syllabus stating the case as follows:

"A railroad company is not responsible to a traveler on the public highway for striking with their train the wagon and horse of the latter at a place where the highway crosses the track of the former, where the injury was the result of accident alone, without negligence or fault on the part of the company or its servants.

"A railroad company is not responsible for not slackening the speed of their train at a place where a public highway crosses their track, unless special circumstances existed which rendered such slackening necessary, and whether such necessity existed is for the jury.

"As well a traveler upon a public highway as a railway company is bound to use ordinary care at a place where the highway crosses the track of the company, and there is no rule of law which absolves the traveler from looking out for the train."

On a subsequent appeal in the *ZEIGLER* case, 7 S. C. 402 (1876), judgment for plaintiff was reversed, the syllabus stating that "a railroad train, when crossing an ordinary public highway, is not bound, unless special circumstances exist making it necessary, to slacken their ordinary speed, and is, therefore, not chargeable with negligence because they did not slacken it."

*Injured while driving on trestle.*

HILL v. PORT ROYAL & WESTERN R'Y CO., 31 S. C. 393 (1889), person driving on railroad trestle thrown out of wagon by striking against benches of trestle; judgment of nonsuit affirmed.

*Killed in railroad yard— Trespasser.*

HALE v. COLUMBIA & GREENVILLE R. R. CO., 34 S. C. 292 (1890), person standing in depot yard watching repairs to engine, killed by moving train; judgment of nonsuit affirmed.

*Climbing between cars of train at crossing.*

LITTLEJOHN v. RICHMOND & DANVILLE R. R. CO., 49 S. C. 12 (1896), person attempting to cross track by climbing between cars of train standing at crossing; judgment for plaintiff reversed, questions whether he was trespasser and whether he was guilty of gross or wilful negligence, were for jury.

See former decision in the LITTLEJOHN case, 45 S. C. 181 (1895), where judgment of nonsuit was reversed, as evidence of negligence should have been submitted to jury. *Held*, that failure to ring bell or sound whistle at crossing, as required by Rev. St., § 1685, makes out *prima facie* case of negligence.

*Pedestrians struck by trains at crossings.*

SPIRES v. SOUTH BOUND R. R. CO., 47 S. C. 28 (1896), person struck by train at crossing; judgment of nonsuit reversed.

WRAGGE v. SOUTH CAROLINA & GEORGIA R. R. CO., 47 S. C. 105 (1896), person killed at crossing; judgment for plaintiff for \$6,039.35 affirmed.

STROTHER v. SOUTH CAROLINA & GEORGIA R. R. CO., 47 S. C. 375 (1896), person killed at crossing; judgment for plaintiff for \$5,000 affirmed: *held*, that under Rev. St., § 1685, it is not necessary to show that failure to ring bell or blow whistle was proximate cause of accident. (Following the WRAGGE case, preceding paragraph.)

*Collisions and crossings.*

See, also, WOODWARD v. SOUTH CAROLINA & GEORGIA R. R. CO., 47 S. C. 233 (1896); DARWIN v. CHARLOTTE, COLUMBIA & AUGUSTA R. R. CO., 23 S. C. 531 (1885), trespasser on pilot of engine killed in collision; KAMINITSKY v. NORTHEASTERN R. R. CO., 25 S. C. 53 (1885), collision between wagon and train at crossing; PETRIE v. COLUMBIA & GREENVILLE R. R. CO., 29 S. C. 303 (1888), woman killed at crossing; see, also, same case, 27 S. C. 63; KINARD v. COLUMBIA, NEWBERRY & LAURENS R'Y CO., 39 S. C. 514 (1893),

collision with wagon and train at crossing; *HANKINSON v. CHARLOTTE, COLUMBIA & AUGUSTA R. R. Co.*, 41 S. C. 1 (1893), person killed on track by train.

*Children injured.*

In *EDGAR v. CASTELLO*, 14 S. C. 20 (1880), an action for negligent killing of plaintiff's child, an infant about three years of age, judgment of nonsuit was affirmed, it being *held*, that a father is not entitled to recover damages for the negligent killing of his infant child.

See, also, *DARWIN v. CHARLOTTE, COLUMBIA & AUGUSTA R. R. Co.*, 23 S. C. 531 (1885), boy, seventeen years of age, riding on pilot of engine, killed in collision; trespasser; judgment for plaintiff reversed.

*Run over on track—Person asleep on track.*

In *FELDER v. LOUISVILLE, CINCINNATI & CHARLESTON R. R. Co.*, 2 McM. (S. C.) 403 (1842), "where the slave of the plaintiff, endowed with ordinary intelligence and acquainted with the nature and manner of using the railroad, voluntarily laid himself down on the road and went to sleep amidst grass so high as to obstruct the view at some distance (over twenty feet ahead), and in this situation, without any fault of the engineer, the engine going at its ordinary speed passed over the body and killed the slave, it was *held*, that the plaintiff could not recover against the company for the price of the slave killed, under the circumstances, and ordered a nonsuit."

See, also, *RICHARDSON v. WIL. & MAN. R. R. Co.*, 8 Rich. (S. C.) 120 (1854), similar case to the *FELDER* case (preceding paragraph), the ruling in which latter case was followed in the *RICHARDSON* case.

*Stock killed on track.*

In *DANNER v. SOUTH CAROLINA R. R. Co.*, 4 Rich. (S. C.) 329 (1851), "an action on the case against a railroad company, to recover damages for the loss of cattle of the plaintiff, killed by the engine and cars of the company, in their passage along the road, it was held, that a negligent killing must be shown. If the proof shows that the killing was wilful, on the part of the engineer, or that it was entirely accidental, the action will not lie. To excuse the company on the ground that the killing was accidental, it is not enough to show that it was not intentional; it must be shown to have occurred unavoidably, and without the least fault on the part of the engineer. When, in such an action, the plaintiff proves no more than that his cattle, pasturing on his own land, were killed by the passenger train of the company, in its passage along the road, and the value of the



cattle, he makes out a *prima facie* case of negligence, which entitles him to recover, unless the company, by proof of the particular manner or circumstances under which the cattle were killed, rebut the presumption of negligence." Defendant's motion for new trial refused. Verdict for plaintiff for \$130.

*Animals injured or killed on track.*

See the following South Carolina cases: *LESEMAN v. SOUTH CAROLINA R. R. Co.*, 4 Rich. (S. C.) 413 (1851); *WILSON v. WIL. & MAN. R. R. Co.*, 10 Rich. (S. C.) 52 (1856); *MURRAY v. SOUTH CAROLINA R. R. Co.*, 10 Rich. 227 (1857); *ROOF v. CHARLOTTE, COLUMBIA & AUGUSTA R. R. Co.*, 4 S. C. 61 (1872); *BROTHERS v. SOUTH CAROLINA R. R. Co.*, 5 S. C. 55 (1873); *ROWE v. GREENVILLE & COLUMBIA R. R. Co.*, 7 S. C. 167 (1875); *JONES v. COLUMBIA & GREENVILLE R. R. Co.*, 20 S. C. 249 (1883); *SIMKINS v. COLUMBIA & GREENVILLE R. R. Co.*, 20 S. C. 258 (1883); *FULLER v. RAILWAY Co.*, and *COCKRANE v. RAILWAY Co.*, 24 S. C. 132 (1885); *WALKER v. COLUMBIA & GREENVILLE R. R. Co.*, 25 S. C. 141 (1885); *JOYNER v. SOUTH CAROLINA R. R. Co.*, 26 S. C. 49 (1886); *MOLAIR v. PORT ROYAL & AUGUSTA R'y Co.*, 29 S. C. 152 (1888), and same case, 31 S. C. 510; *DAVIS v. R. R. Co.*, 30 S. C. 613 (1888); *HARLEY v. EUTAWVILLE R. R. Co.*, 31 S. C. 151 (1889); *HARMON v. COLUMBIA & GREENVILLE R. R. Co.*, 32 S. C. 127 (1889); see, also, 28 S. C. 401; *NEELY v. CHARLOTTE, COLUMBIA & AUGUSTA R. R. Co.*, 33 S. C. 136 (1890).

PERSON UNLOADING COAL CAR RUN OVER BY ENGINE.—NEGLIGENCE FOR JURY—NEW TRIAL.—In *ALT v. CHICAGO & NORTHWESTERN R'y Co.*, 5 S. Dak. 20 (1894), where plaintiff unloading a coal car on defendant's right of way was run over by engine, order setting aside verdict for defendant and granting a new trial was affirmed. It was held that "to judicially determine a question of negligence, both a court and a jury are required. While a jury is the judge of the facts viewed in the light of the law, as a rule no verdict should stand when, in the sound judgment of the trial court, it operates as a wrong between the parties which might be remedied upon a retrial. The question to be determined by this court, where the refusal of a trial court to direct a verdict is raised on appeal, is whether such court was justified, in the exercise of its best judgment and sound discretion, in concluding that different fair-minded men might reasonably arrive at different conclusions from a careful consideration of all the facts and circumstances in evidence at the time the case was submitted to the jury." \* \* \*

*Animals injured or killed on track.*

IN *BATES v. FREMONT, E. & M. V. R. R. Co.*, 4 S. Dak. 394 (1893), stock killed on track, it was *held*, as per syllabus by the court, that "Section 5501, Compiled Laws, makes proof of the killing of stock by a railroad company *prima facie* evidence of the negligence of the company, and an averment, in the complaint in such an action, that the stock were so killed within the terms of the statute, is a sufficient averment of negligence on the part of the company." It was also *held*, that "where the plaintiff was driving a number of loose horses and mules along the highway in the afternoon and towards a railroad crossing, the track for some distance being obscured by an intervening embankment, knowing that a train was due to pass during the afternoon, but not at what hour, the fact that he did not ride ahead and hold his stock back until he could and did go to the track and ascertain whether or not a train was coming, is a fact tending to show contributory negligence and as such, should go to the jury with all the circumstances of the case but it does not establish contributory negligence as matter of law." Judgment for plaintiff affirmed.

See, also, *HEBRON v. CHICAGO, M. & ST. P. R'y Co.*, 4 S. Dak. 538 (1894); *HARRISON v. CHICAGO, M. & ST. P. R'y Co.*, 6 S. Dak. 100 (1894); *SHELDON v. CHICAGO, M. & ST. P. R'y Co.*, 6 S. Dak. 606 (1895); *LEWIS v. FREMONT, E. & M. V. R. R. Co.*, 7 S. Dak. 183 (1895); *BENNETT v. CHICAGO, M. & ST. P. R'y Co.*, 8 S. Dak. 394 (1896); *HUTCHINSON v. CHICAGO, M. & ST. P. R'y Co.*, 9 S. Dak. 5 (1896).

## RAILROAD COMPANY v. BRIGMAN.

*Supreme Court, Tennessee, November, 1895.*

[Reported in 95 Tenn. 624.]

**RES ADJUDICATA — PLEADING — PROOF.** — In order to sustain the plea of *res adjudicata* it must be averred and proved that the former judgment was final.

**ABATEMENT — PLEADING AND PRACTICE.** — A plea in abatement cannot be pleaded at the same time with a plea in bar, for the plea in bar is inconsistent with the plea in abatement, and the latter is overruled by the former.

**PERSON AND PROPERTY INJURED IN COLLISION AT CROSSING — SEPARATE CAUSES OF ACTION — QUERY.** — Whether a wrongful act may give rise to two or more causes of action, as an action for damages for injury to plaintiff's wagon caused by collision with defendant's train at a crossing, and an action for personal injuries sustained in the same accident, not decided (1).

1. *Injuries to property and to person.* Division, First Department, New York. — See *REILLY v. SICILIAN ASPHALT PAVING Co.* (Supreme Court, Appellate it being held that where a judgment is February, 1897), 1 Am. Neg. Rep. 505,

APPEAL from Circuit Court, Washington County. The facts are stated in the opinion. *Judgment affirmed.*

KIRKPATRICK, WILLIAMS & BOWMAN, for railroad company.  
HACKER & SON, DEADERICK & EPPS, for Brigman.

**McAlister, J.** — The plaintiff below, while attempting, with his wagon and team, to cross the track of the railroad company at Ball's Crossing, Washington county, was overtaken by a passing train and violently thrown from his wagon, whereby he

rendered and satisfied in an action for injuries to personal property, it is a sufficiently substantial defense to entitle the defendant to be allowed to plead it in a supplementary answer in an action for damages for injuries to the person where both causes of action arose out of the same negligent act, and the judgment was rendered and satisfied subsequent to the service of the answer. (Citing *Nathans v. Hope*, 77 N. Y. 420; *Secor v. Sturgis*, 16 N. Y. 548, distinguishing *Perry v. Dickerson*, 85 N. Y. 345.)

See also subsequent decision in the same case (*Reilly v. Sicilian Asphalt Paving Co.*), rendered by the Supreme Court in June, 1898 (reported in 4 Am. Neg. Rep. 692), where it was held that "but one cause of action arises from an act of negligence whereby the property and person are injured at the same time and a recovery in an action for damages to one will bar a subsequent action for damages to the other. (Citing *Nathans v. Hope*, 77 N. Y. 420; *Secor v. Sturgis*, 16 N. Y. 548; *Perry v. Dickerson*, 85 N. Y. 345; *Howe v. Peckham*, 6 How. Pr. 229; *Jex v. Jacob*, 19 Hun, 105; *Brunsdon v. Humphrey*, 14 Q. B. Div. 141, in which latter case the dissenting opinion of Lord Coleridge was approved.)

But the contrary doctrine was held in *Mulligan v. Knickerbocker Ice Co.* (an unreported case, decided in the City Court of Brooklyn in 1888), 4 Am. Neg. Rep. 692-694, the opinion being rendered by Clements, Ch. J., which was affirmed by the Court of Appeals, without opinion, in 109 N. Y. 657.

And see *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 11 Am. Neg. Rep. 328 (decided by the New York Court of Appeals in February, 1902), which reversed the ruling in 4 Am. Neg. Rep. 692, 31 App. Div. (N. Y.) 302.

In *New York*, it has been decided that an injury to person and one to property, though resulting from the same tortious act, constitute different causes of action. So held, where injury to plaintiff's person and vehicle was caused by collision with a gravel heap placed on the road through defendant's negligence, and plaintiff brought separate actions, recovering judgment in action for injury to vehicle, which judgment defendant pleaded as bar to recovery in action for personal injury, the defense being sustained by the Supreme Court, and plaintiff's action for personal injury dismissed, but the Court of Appeals reversed the judgment (*Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 11 Am. Neg. Rep. 328).

In *England*, it has been held by the Court of Appeal (Lord Coleridge, Ch. J., dissenting), that damages to person and to property, though occasioned by the same wrongful act, give rise to different causes of action. *Brunsdon v. Humphrey*, 14 Q. B. Div. 141.

In *Massachusetts*, *Minnesota* and *Missouri*, the contrary doctrine has been declared. See *Doran v. Cohen*, 147 Mass. 342; *King v. Chicago, M. & St. P. R'y Co.* (Minn.), 8 Am. Neg. Rep. 346, 347; *Von Fragstein v. Windler*, 2 Mo. App. 598.

sustained serious and permanent personal injuries. In said collision, the wagon was demolished, the horses killed, and the harness broken.

The record discloses that, on December 15, 1894, the said Brigman commenced an action in the Circuit Court at Jonesboro to recover damages for the loss of the personal property, which resulted in a verdict and judgment at the April Term, 1895, in favor of the plaintiff for the sum of \$250. The company appealed in error to this court.

It further appears that, on March 21, 1895, the said Brigman instituted another suit against the railroad company in the said Circuit Court to recover damages for personal injuries sustained by him in said accident. To the latter suit the company pleaded the general issue, and, in addition, filed two special pleas, viz. :

1. "And for further plea, the defendant says that, before the commencement of this suit, to wit, on December 15, 1894, the plaintiff commenced another suit against it in the Circuit Court of Washington county, for the very same cause of action now stated in his declaration, and, at the April Term, 1895, of said court said suit was tried upon its merits and judgment was rendered for the plaintiff for \$250 and costs, from which judgment defendant company prayed and perfected an appeal to the Supreme Court at Knoxville. And the defendant avers that the parties in this suit and the former suit are the same, and that said former suit is still pending in the Supreme Court of the State of Tennessee.

2. "And for further plea, the defendant says that the plaintiff sued the defendant in the Circuit Court of Washington county, at Jonesboro, on December 15, 1894, for the very same cause of action now stated in his declaration, and that, at the April Term, 1895, of said court, said suit was tried upon its merits, and judgment was rendered in favor of the plaintiff for \$250 and costs, as, by the records and proceedings of said court, more fully appears, and said judgment still remains unreversed."

The present suit was tried at the August term, 1895, upon the general issues and the special pleas just recited. The trial judge charged the jury, among other things, as follows, to wit: "As to defendant's second and third pleas, I charge you that, if you find plaintiff commenced a suit before the bringing of this suit, on December 15, 1894, against defendant for this, the same cause of action, and such suit was tried and determined upon its

merits, then such pleas would be good, and you would find for defendant; but, before these pleas of former suit could aid defendant, you must find that such suit was for the same cause of action, arising from the same wrongful act of defendant. If said former suit pleaded was for a cause of action other than for personal injury to the plaintiff or to recover money incident to such personal injury, although arising from same act of defendant, it could not be considered in bar of a recovery in this action."

The trial resulted in a verdict and judgment in favor of the plaintiff for the sum of \$1,250. The company appealed, and the only error assigned is upon the charge of the circuit judge in respect of the effect upon this suit of the former suit to recover damages for the loss of the wagon and team. The argument of counsel for plaintiff in error is, "that an entire claim or demand, arising out of a single transaction, cannot be divided into separate and distinct claims, and two suits maintained, and that, in this respect, there is no difference between action founded in tort and action upon a contract." He, therefore, insists that, if plaintiff sues for only a part of an entire cause of action, and obtains judgment for such part, in neither case can he maintain another action founded upon the same cause of action. The first judgment will be a positive bar to the subsequent action.

In support of his position, counsel cites Freeman on Judgments, in which it is said, viz.: "A single tort can be the foundation for but one claim for damages. \* \* \* All damages which can, by any possibility, result from a single tort form an indivisible cause of action. Every cause of action in tort consists of two parts, to wit: the unlawful act, and all damages that can arise out of it. For damages alone, no action can be permitted. Hence, if a recovery has once been had for the unlawful act, no subsequent suit can be maintained. There must be a fresh act, as well as fresh damages." 1 Freeman on Judgments, § 241; 2 Black on Judgments, § 738; Thompson v. Rice, Thomp. Tenn. Cas. 127; 7 Lea, 407; 6 Baxt. 320; Carraway v. Burton, 4 Humph. 108; Saddler v. Apple, 9 Humph. 342; Tarbox v. Hartenstein, 4 Baxt. 80; 2 Chitty Pl. 850; Knowlton v. N. Y., etc., R. R. Co., 147 Mass. 605; Code (M. & V.), § 3441.

Counsel for the plaintiff below concede the general proposition, but his insistence is that the same wrongful act may give rise to two or more causes of action. Counsel, in support of the proposition, cites Black on Judgments, in which it is said, viz.:

"While a party is not allowed to split up an entire and inseverable cause of action, and prosecute it by piecemeal, nor to present only a portion of the grounds on which relief is sought, and save the rest for a second suit if the first fail, yet this rule does not require that distinct causes of action, each of which by itself would authorize independent relief, should be presented in a single suit, although they exist at the same time and might be considered together." § 774.

The same author, at § 740, says: "We have seen that, as a rule, only one cause of action can arise from one tort. But there are exceptional cases, in which the same act may occasion several distinct injuries, and these may be made the basis of as many separate suits. Thus, damage to goods and injuries to the person, although caused by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and, therefore, the recovery of compensation for the damage to the goods is no bar to an action subsequently commenced for the personal injury." *Brunsden v. Humphrey*, L. R. 14 Q. B. Div. 141 (1); *Waggoner v. White*, 11 Heisk. 741; Ency. Pl. and Pr., vol. 1, p. 159; Bigelow on Estoppel, p. 173.

We have thus presented the contentions of the respective parties, together with the authorities cited, which have been reinforced with arguments of great ability. We find, however, that, on account of the state of the pleadings, we are precluded from deciding the very interesting question presented.

In the first place, the plea in bar of *res adjudicata* is not availing, for the reason that the former judgment pleaded was not final. The record discloses that when the second plea was filed, the judgment in the former suit had been appealed to this court and was still pending and undetermined. In order to sustain the plea of *res adjudicata*, it must be averred and proved that the former judgment was final.

The other plea of former suit pending is a plea in abatement,

1. *Brunsden v. Humphrey*, 14 Q. B. Div. 141, was an action for damages for injuries to plaintiff's person sustained in a collision of defendant's cab with that of the plaintiff, who had previously brought suit and recovered damages for injuries to his cab. The majority of the court held that damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to different causes of action; and therefore the recovery in an action for damage to the goods is no bar to an action subsequently commenced for the injury to the person. Lord Chief Justice Coleridge dissented.

and was waived or overruled by the plea of not guilty. The record shows that the pleas of not guilty, former suit pending, and *res adjudicata*, were all filed at the same time, and the issues presented by these respective pleas were tried by the jury conjointly. Whatever may be the practice in courts of chancery, in treating the plea of former suit pending as a special plea in bar, it is well settled that in courts of law, such a defense can only be presented by a plea in abatement, which is overruled by a plea to the merits.

Mr. Gibson, in *Suits in Chancery*, note to section 333, says:

"This is manifestly not a plea in bar logically considered, for, if successful, it does not bar the suit, but only abates it, and if, after the plea is allowed, the former suit is dismissed by the complainant, he can bring a third suit in the court allowing the plea, against the same parties and for the same purpose, and the dismissal of both or either of the former suits cannot be pleaded in bar of the third suit." He admits, however, that, under the practice in chancery, it is treated as in the nature of a plea in bar, and may be incorporated in an answer, since it does not go to the jurisdiction of the court.

Mr. Chitty, in his work on Pleading, lays down the rule that the pendency of a former action must be pleaded in abatement. Vol. 1, p. 453. Caruthers, in the *History of a Lawsuit*, classifies such a plea as a plea in abatement, and states that its effect is to abate or quash the writ, the declaration, of course, going with it. §§ 185, 186. *Johnson v. Irby*, 8 Humph. 654.

Moreover, a plea in abatement cannot be pleaded at the same time with a plea in bar, for the plea in bar is inconsistent with the plea in abatement, and the latter is overruled by the former. *Wood v. Belcher*, 7 Yer. 105, 106; *Grove v. Jenkins*, 9 Yer. 7, 8; *Waggoner v. Memphis Dry Dock Co.*, 10 Heisk. 503.

We conclude, therefore, that the question presented in the plea in abatement, and which has been so elaborately argued by learned counsel, is not before this court, since the plea in abatement was overruled or waived by the plea to the merits of the case.

**Affirmed.**

*Collision between wagon and train at crossing.*

NASHVILLE, CHATTANOOGA & ST. LOUIS R. R. CO. *v.* SEABORN, 85 Tenn. 391 (1886), collision between wagon and train at crossing, and driver killed; judgment for plaintiff for \$10,000 reversed;

erroneous charge that even if deceased was negligent, recovery could be had if injury was wilfully inflicted, where there was no evidence of wilfulness.

RAILWAY CO. *v.* HOWARD, 90 Tenn. 144 (1891), collision between wagon and train at crossing, and person driving killed; judgment for plaintiff reversed; incompetent evidence on measure of damages.

*Collision between wagon and street car.*

KATZENBERGER, REC'R, *v.* LAWO, 90 Tenn. 235 (1891), collision between wagon driven by Lawo and dummy train of street cars, operated by Katzenberger, as receiver of railway; judgment for plaintiff for \$3,000 affirmed.

See, also, CITIZENS RAPID TRANSIT CO. *v.* SIEGRIST, 96 Tenn. 119 (1896), collision between wagon and street car.

*Comparative negligence — Repudiation of doctrine.*

In RAILWAY CO. *v.* HULL, 88 Tenn. 33 (1889), the court said (per FOLKES, J.), that the doctrine of comparative negligence had been expressly repudiated in Tennessee. Citing RAILROAD CO. *v.* GURLEY, 12 Lea, 55; RAILWAY CO. *v.* FAIN, 12 Lea, 35.

*Horse frightened by train.*

EAST TENNESSEE, VIRGINIA & GEORGIA R. R. CO. *v.* FEATHERS, 10 Lea (78 Tenn.), 103 (1882), action by husband to recover damages for injuries sustained by his wife by reason of horse she was riding becoming frightened by train at crossing; judgment for plaintiff reversed; statutory duty (Code, § 1166, subsection 3) to ring bell on approaching crossing, not applying to persons injured while traveling along public road near and parallel to railroad.

PERSON WALKING ON TRACK KILLED BY TRAIN — PROXIMATE CAUSE — LOOKING AND LISTENING — TRESPASSER. — In PATTON, ADM'R *v.* RAILWAY CO., 89 Tenn. 370 (1890), it appeared that John C. Tipton was killed by collision with a train operated by defendant in error, while walking upon the track, an action was brought by his administrator, demurrer was filed to the declaration which was sustained and the suit dismissed. On appeal to the Supreme Court, it was held (as per syllabus to the report), that "negligence of railway company that causes separation of a moving train is not the proximate cause of an injury sustained by a person who subsequently came upon the track in front of, and was struck by, the detached cars, which were moving by impetus and gravitation." It was also held that "the mere fact that a person was a trespasser upon the track of a railway company at the time



he was injured by its negligence, does not necessarily constitute a bar to his recovery for the injury. The fact, however, constitutes contributory negligence to be considered by the jury."

In the PATTON case, *supra*, it was also held (as per syllabus to the report), that "it is the duty of a person about to go upon a railway track, to look and listen for trains and to continue to do so, while he remains upon the track. The neglect to perform this duty constitutes contributory negligence that may defeat an action by such person for injuries received while upon the track from other negligence than failure of the company to observe the required statutory precautions. The failure of a trespasser upon a railway track to look and listen for trains may be so far excused as to prevent an absolute bar of his suit, but not to exonerate him from contributory negligence, to be considered in mitigation of damages, when he was unexpectedly struck and injured by detached cars moving by impetus and gravitation, just in rear of the regular train to which he had surrendered the track and then resumed his journey, and when it appears that he was crossing a bridge, and probably could not have heard the approach of the cars on account of the noise of an adjacent waterfall." Case remanded.

*Run over while asleep on track.*

EAST TENNESSEE & GEORGIA R. R. CO. *v.* ST. JOHN, 5 Sneed (37 Tenn.) 524 (1858), slave asleep on track run over and killed by train; judgment for plaintiff affirmed.

*Crossing track at railroad yard.*

MORAN *v.* NASHVILLE & CHATTANOOGA R. R. CO., 2 Baxt. (61 Tenn.) 379 (1872), person struck by train while crossing track in railroad yard; judgment for defendant affirmed.

*Walking along track.*

NASHVILLE & CHATTANOOGA R. R. CO. *v.* SMITH, ADM'R, 9 Lea (77 Tenn.), 470 (1882), person walking on track struck and killed by train; judgment for plaintiff for \$3,500 reversed; damages recoverable only such as deceased could have claimed had she lived.

*Intoxicated person run over on track.*

In HILL *v.* LOUISVILLE & NASHVILLE R. R. CO., 9 Heisk. (56 Tenn.) 823 (1872), where intoxicated person on track was run over and killed by train, judgment for plaintiff for \$2,250 was affirmed, and the court, in construing the statutory duty of railroad companies (Code, §§ 1166, 1167, 1168) to take all precautions to prevent accidents to persons or stock on track, said "The statute does not brook the slightest speculation upon things that are probable or possible,

either by the court or by the company's agents, but demands an absolute obedience to its provisions, whether they seem necessary or not. We do not know what might have been the effect of the alarm whistle even upon the maudlin brain of a drunken man; nor are we allowed to conjecture as to the question whether the timely startle of the alarm whistle might not have saved this man's life and spared the company this litigation. How could the engineer known that the deceased was not both blind and deaf? It was the positive and imperative duty of the engineer to have given the alarm the instant he saw these persons on the track." \* \* \* (Citing *Smith v. Nashville & Chattanooga R. R. Co.*, 6 Coldw. 589; *Burke v. Nash. & C. R. R. Co.*, 6 Coldw. 45; *Smith v. Nash. & C. R. R. Co.*, 6 Heisk. 174; *Thomas v. Nash. & C. R. R. Co.*, 5 Heisk. 262, etc.)

*Intoxicated person on track — Contributory negligence — Mitigation of damages.*

*LOUISVILLE & NASHVILLE R. R. CO. v. CONNER*, ADM'X, 2 Baxt. (61 Tenn.) 382 (1872), intoxicated person run over and killed on track; judgment for plaintiff for \$4,000 reversed, it being held that if the injury was due to contributory negligence of deceased, the jury might consider that fact in assessing damages.

See, also, *NASHVILLE & CHATTANOOGA R. R. CO. v. NOWLIN*, 1 Lea (69 Tenn.), 523 (1878), person injured on track, where judgment for \$3,500 was reversed, it being held, that slight or gross negligence of injured party might be considered in mitigation of damages.

*Intoxicated persons on track.*

*EAST TENNESSEE, VIRGINIA & GEORGIA R. R. CO. v. FAIN*, 12 Lea (80 Tenn.), 35 (1883), intoxicated person run over on track; judgment for plaintiff affirmed.

*LITTLE ROCK & MEMPHIS R'Y CO. v. WILSON*, 90 Tenn. 271 (1891), person drunk and asleep on track run over by train; judgment for plaintiff for \$1,500 affirmed.

*EAST TENNESSEE & WESTERN NORTH CAROLINA R. R. CO. v. WINTERS*, 85 Tenn. 240 (1886), person, under influence of liquor, walking on railroad trestle, struck and killed by train; judgment for plaintiff for \$1,700 reversed, the damages being arrived at in manner held to be a gambling verdict.

*Collisions and crossings.*

See *WEBB v. RAILWAY CO.*, 88 Tenn. 119 (1889), person killed at crossing; *RAILWAY CO. v. FOSTER*, 88 Tenn. 672 (1890), colored man walking along track, struck by train and fatally injured; *SOUTHERN*

R'Y CO. v. PUGH, 95 Tenn. 419 (1895,) injured by cars making running switch; see, also, same case, 97 Tenn. 624 (1896).

See, also, SHANNON'S TENNESSEE CASES (3 vols.), where several collision and crossing cases decided in Tennessee, but not included in the official reports, are reported.

*Children run over by trains and street cars.*

LOUISVILLE & NASHVILLE R. R. CO. v. CONNOR, ADM'X, 9 Heisk. (56 Tenn.) 19 (1871), child, eighteen months old, run over and killed by train; judgment for plaintiff for \$3,000 affirmed.

MEMPHIS CITY R'Y CO. v. LOGUE, ADM'R, 13 Lea. (81 Tenn.), 32 (1884), colored child, about three years old, run over and killed by street car; judgment for plaintiff reversed, an instruction that "it is the duty of the defendant to furnish lights on its cars at night, such as will enable its drivers to see objects ahead on the track, with the aid of the street lights, in time to avoid an accident," being erroneous.

BAMBERGER v. CITIZENS' STREET R'Y CO., 95 Tenn. 18 (1895), child, about three years old, run over by street car; negligence of parent defeats recovery by parent for injury to child; judgment for defendant affirmed. The court (per WILKES, J.), reviewed the authorities on the question of contributory negligence of infants and negligence of parents.

*Animals injured or killed on track.*

IN MEMPHIS & CHARLESTON R. R. CO. v. DEAN, 5 Sneed (37 Tenn.) 291 (1858), it was held that "the Act of 1856, ch. 94, § 8, requires all railroad companies within this State to keep a special watchman upon the locomotive when in motion to watch the track and give warning of any obstacle or obstruction. This is a special duty to be performed by one person, as his sole occupation while the train is in motion, and if in the absence of such special watchman, injury result to person or property, by being overrun, said company is liable in damages as for negligence." Judgment for plaintiff, in action for killing of stock by train, affirmed.

See, also, MEMPHIS & CHARLESTON R. R. CO. v. SMITH, 9 Heisk. (56 Tenn.) 860 (1872); LOUISVILLE & NASHVILLE R. R. CO. v. STONE, 7 Heisk. (54 Tenn.) 468 (1872); NASHVILLE & CHATTANOOGA R. R. CO. v. THOMAS, 5 Heisk. (52 Tenn.) 262 (1871); EAST TENNESSEE, VIRGINIA & GEORGIA R. R. CO. v. SCALES, 2 Lea (70 Tenn.) 688 (1879); HOLDER v. CHICAGO, ST. LOUIS & NEW ORLEANS R. R. CO., 11 Lea (79 Tenn.) 176 (1883); LOUISVILLE, NASHVILLE & GREAT SOUTHERN R. R. CO. v. REIDMOND, 11 Lea (79 Tenn.) 205 (1883); RAILROAD CO. v. SCOTT, 87 Tenn. 494 (1889); R. R. CO. v. SADLER,

and R. R. Co. v. WOODRUFF, 91 Tenn. 508 (1892); CINCINNATI, NEW ORLEANS & TEXAS PAC. R'y CO. v. RUSSELL, 92 Tenn. 108 (1892); FINK ET AL. v. EVANS, 95 Tenn. 413 (1895); CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R'y CO. v. STONECIPHER, 95 Tenn. 311 (1895); R. R. Co. v. McDONOUGH, 97 Tenn. 255 (1896).

## DILLINGHAM ET AL. (RECEIVERS OF HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY) V. PARKER.

*Supreme Court, Texas, Austin Term, April, 1891.*

[Reported in 80 Tex. 572.]

**NEGLIGENCE — QUESTION OF FACT.** — 1. As a general rule, where an act is not unlawful a court cannot denounce it as negligence from which liability follows. It is for the jury to say, under proper instructions, whether the particular acts under investigation are negligent or not.

**TEXAS CASES FOLLOWED.** — 2. *Texas & Pac. R'y Co. v. Murphy*, 46 Tex. 356, 6 Am. Neg. Cas. 462, and *Gulf, Colorado & Santa Fe R'y Co. v. Greenlee*, 70 Tex. 553, adhered to.

**UNAUTHORIZED ACT — WHEN RAILWAY COMPANY LIABLE.** — 3. A railway company would not be liable for an injury caused by an unauthorized party handling its machinery. But where a brakeman, in absence of the engineer, having no authority, started an engine and caused an injury, and it appeared that a fireman was at his post and consented to the brakeman's acts, it cannot be held that the railway company is absolved from liability (1).

(Official syllabus to the Report.)

**APPEAL** from Grayson. The facts appear in the opinion.  
*Judgment reversed.*

R. DE ARMOND, for appellants.

J. P. COX and HARE, EDMUNDSON & HARE, for appellee.

**GAINES, ASSOCIATE JUSTICE.** — This action was brought by appellee to recover of appellants, as receivers, of the Houston and Texas Central Railway Company, damages for personal injuries alleged to have resulted to him by reason of the negligence of the defendants in obstructing the view of the track, and in operating a train so as to cause a collision with a wagon, in which plaintiff was crossing the track. The plaintiff and two other persons attempted to cross the main track of the railway at a regular crossing in the city of Sherman, in a wagon drawn by horses, but before the track was passed, the wagon was struck by

1. See notes of cases, at end of this case, relating to injuries to persons driving across track.

a moving train and was overturned. The plaintiff, as he testified, was thrown to the ground and painfully injured. There was evidence tending to show that the train was moved upon the crossing without either the blowing of the whistle, or the ringing of the bell. Upon this question, however, there was a conflict in the testimony. There was also evidence tending to show that there were cars standing upon the side track near the crossing in such position as to obstruct not only the view, but also the noise of the approaching train.

The court, among other things, charged the jury as follows: "It is the duty of those operating railway locomotives and cars to use reasonable care not to permit the view of the track to become obstructed with cars standing on the side tracks, so that persons passing along a public road or street cannot conveniently see and hear a passing engine or train as they approach the crossing of the track; and receivers so operating such railways are liable in damage for an injury to any one passing along such road or street, by reason of any negligence on the part of their employees in failing to use such reasonable care.

We are of opinion that the court erred in giving this instruction. The case of *Tex. & Pac. R'y Co. v. Murphy*, 46 Tex. 356, 6 Am. Neg. Cas. 462, is directly in point. In that case, "the court charged the jury in effect that the defendant was guilty of negligence in managing the train, if the conductor, after stopping a very short space of time, gave the signal of departure and at the same instant of giving said signal, caused the train to move, and the plaintiff was injured by the force and the moving of the train, while he was attempting to get on the car." The court in the opinion, after saying in effect, that if any law could be found which made it the duty of a conductor to wait a reasonable time after giving the signal, the charge would have been correct, used the following language. "In the absence of any such law defining the acts which constitute negligence, it is a fact to be found by the jury, upon evidence, as any other material fact." The doctrine was reaffirmed in *Gulf, Colo. & Santa Fe R'y Co. v. Greenlee*, 70 Tex. 553, and has been recognized by many other cases in this court. We have no statute which provides that a railway company shall not permit an accumulation of cars upon its side tracks at a crossing so as to obstruct the hearing or the view of an approaching train, and it was, therefore, error to instruct the jury that such an act constituted negligence. It was

for the jury to say under proper instructions whether the particular acts were negligent or not.

There was evidence to show that the engineer in charge of the train, which inflicted the injury, left his engine and went a short distance for the purpose of procuring washers to repair the steam joint, and that in his absence, the brakeman took charge of the engine and moved the train and thereby caused the collision, which inflicted the injury.

It was shown that it was not a part of the brakeman's duty to operate the engine. It appeared, however, in evidence that the fireman was upon the engine at the time it was being moved. Upon this phase of the case counsel for the defendants asked the court to give the following charge:

"If you believe from the testimony that at the time of the accident, the engine was being operated by a brakeman, and operating an engine was no part of his employment or duty, and that the railway company had not employed him for any such purpose, nor authorized him to do so, the defendants are not responsible for his acts, while so operating the engine or for damages done or injuries inflicted by the engine, while being operated by him."

The instruction was refused, and in this ruling there was no error. If the fireman had not been upon the engine the charge may, under the allegations in the petition, have been proper. But upon that question we give no opinion. The testimony does not inform us as to the fireman's duty in the premises. In the absence of the engineer he may properly have had control of the engine, and the testimony tends to show that the train was moving with his consent. If he was properly in charge and if the train was moved with his consent, then the mere fact that the brakeman was acting out of the sphere of his duty would not absolve the company from liability.

The other assignments question the sufficiency of the evidence to support the verdict, and will not be considered.

For the error indicated, the judgment is reversed and the cause remanded.

NOTES OF TEXAS CASES RELATING TO COLLISIONS  
BETWEEN TRAINS AND VEHICLES AT CROSSINGS.

Among the Texas cases relating to Accidents to Persons Driving over Railroad Crossings, are the following:

**Collisions at crossings.**

In *HOUSTON & TEXAS CENTRAL R'Y CO. v. WILSON*, 60 Tex. 142 (1883), action for personal injuries and destruction of wagon and killing of horse in collision with freight train at crossing, judgment for plaintiff for \$1,000 was affirmed. The syllabus states the case as follows: "When the statute requires an act to be done, a failure to do it is negligence *per se*, and will be so declared as matter of law. In the absence of a statute requiring one about to cross a railway track to stop and listen for an approaching train, it cannot be declared as matter of law that a failure to do so would constitute negligence in one who, in attempting to cross the track, was injured by train of whose approach he was not aware. A failure to ring the bell or sound the whistle for a distance of eighty rods before an engine passes a public road is, as matter of law, negligence." \* \* \*

*GULF, COLORADO & SANTA FE R'Y CO. v. GREENLEE ET UX.*, 62 Tex. 351 (1884), husband and wife injured in collision with train at crossing; judgment for \$15,000 reversed. *Held* (as per syllabus), that "in a suit for damages by husband and wife for injuries inflicted by a passing railway train on the latter, while she, with her husband, was passing over a railway crossing, and in a vehicle driven by her husband, the wife would be bound by the negligence of the husband."

See, also, *GULF, COLORADO & SANTA FE R'Y CO. v. GREENLEE*, 70 Tex. 553 (1888), referred to in *Dillingham v. Parker*, 80 Tex. 572, 12 Am. Neg. Cas. 595, *ante*. In the Greenlee case, judgment for \$6,500 was affirmed.

*TEXAS & PACIFIC R'Y CO. v. WRIGHT*, 62 Tex. 517 (1884), collision between wagon and train at crossing; judgment for plaintiff for \$1,250 affirmed.

*MISSOURI PACIFIC R'Y CO. v. LEE*, 70 Tex. 496 (1888), collision between train and wagon at crossing; person driving killed; judgment for plaintiff (mother of deceased) for \$5,000 affirmed.

In *GALVESTON, HARRISBURG & SAN ANTONIO R'Y CO. v. PORFERT*, 72 Tex. 351 (1888), collision between wagon and train at crossing; judgment for plaintiff for \$16,666 was reversed. The syllabus states the points as follows "Where the testimony of the plaintiff shows that when crossing the track at right angles and when his team of two horses had crossed the track, and when seated in the wagon about the middle of the track, he first saw the approaching train at a distance of 390 feet: *Held*, that his failure to leave the track before

he approach of the train was so manifestly a want of care as to require a verdict for damages for plaintiff to be set aside. The verdict found 'for peril and fright,' \$833; 'mental anguish,' \$1,666; 'pain and suffering,' \$6,667; *held*, that the items for *peril and fright* and for *mental anguish*, were included in *pain and suffering*, and in the judgment upon the verdict they should not have been included."

GALVESTON, HARRISBURG & SAN ANTONIO R'Y CO. *v.* KUTAC ET AL., 76 Tex. 478 (1890), collision between train and wagon while crossing track and the mother of plaintiffs, who was in wagon, killed; judgment for plaintiffs reversed.

See, also, former decision in the KUTAC case, 72 Tex. 643 (1889), where judgment for plaintiffs for \$10,000 was reversed.

TEXAS & PACIFIC R'Y CO. *v.* BAILEY, 83 Tex. 19 (1892), collision between wagon and train at crossing; judgment for plaintiff reversed (question of parties and right to sue).

GULF, COLORADO & SANTA FE R'Y CO. *v.* SHIEDER, 88 Tex. 152 (1895), plaintiff's wife injured in collision between vehicle in which she was riding and train at street crossing; judgment for plaintiff affirmed.

*Collision between train and street car*

SAN ANTONIO & ARANSAS PASS R'Y CO. *v.* WAY, 9 Tex. Civ. App. 214 (1894), motorman of street car injured in collision between train and street car at street crossing; judgment for plaintiff for \$2,300 affirmed.

**Horse frightened by noise of train, etc.**

TEXAS & PACIFIC R'Y CO. *v.* CHAPMAN, 57 Tex. 75 (1882), plaintiff's horses becoming frightened at railroad crossing, and wagon struck and plaintiff injured by train; judgment for plaintiff affirmed.

INTERNATIONAL & GREAT NORTHERN R'Y CO. *v.* GRAVES, 59 Tex. 332 (1883), plaintiff's team frightened by noise of train at crossing, running away, upsetting wagon and injuring plaintiff; judgment for plaintiff for \$1,500 reversed for erroneous instructions as to statutory duty of railroad company to reduce speed of train at street crossing, there being no statute regulating same.

TEXAS & PACIFIC R'Y CO. *v.* LOWRY, 61 Tex. 154 (1884), plaintiff's team frightened by train at crossing and plaintiff injured and his property destroyed by team running away; judgment for plaintiff for \$2,000 affirmed.

HOUSTON & TEXAS CENTRAL R'Y CO. *v.* CARSON, 66 Tex. 345 (1886), horse frightened by train at crossing and wagon upset injuring person driving; judgment for plaintiff for \$2,500 affirmed.



GULF, COLORADO & SANTA FE R'Y CO. *v.* KEITH, 74 Tex. 287 (1889), plaintiff's team becoming frightened, running on track and killed in collision with train; judgment for plaintiff reversed.

HARGIS *v.* ST. LOUIS, ARKANSAS & TEXAS R'Y CO., 75 Tex. 19 (1889), plaintiff's team, after crossing track, frightened by noise of signals of backing train, running away and plaintiff injured; judgment for defendant affirmed.

GULF, COLORADO & SANTA FE R'Y CO. *v.* BOX, 81 Tex. 673 (1891), team frightened by noise of train approaching crossing, and person riding in wagon injured; judgment for plaintiff affirmed; motion for rehearing refused.

In JOHNSON ET AL. *v.* GULF, COLORADO & SANTA FE R'Y CO., 2 Tex. Civ. App. 139 (1893), it appeared that "Johnson, who was blind and riding in a wagon, driven by his father, was leading a horse behind it. As the wagon crossed over a railway track, the horse, becoming frightened, pulled back, throwing Johnson on the track in front of an advancing hand car, which struck and killed him. In a suit against the railway company, for causing the death, the court charged that 'if the employees in charge of the hand car saw the wagon of G. W. Johnson, in which deceased was riding, stop before reaching the railway, and were thereby led to believe that no effort would be made to cross said railway until it passed the crossing, then it was not negligence in said employees not to stop said hand car.' The evidence was conflicting as to whether the wagon stopped before crossing the track, and in this state of the proof the charge above was objectionable as being on the weight of evidence, and also as intimating that in the opinion of the court, the wagon did stop." Judgment for defendants reversed.

GULF, COLORADO & SANTA FE R'Y CO. *v.* LANKFORD, 9 Tex. Civ. App. 593 (1895), plaintiff driving near tracks of defendant company, and horses becoming unmanageable, struck by moving car; judgment for plaintiff for \$1,000 affirmed, defendant's employees having seen plaintiff's danger, making no effort to avert the collision.

TEXAS & PACIFIC R'Y CO. *v.* ROBERTS ET AL., 14 Tex. Civ. App. 532 (1896), person riding mule and trying to lead same off track, struck and killed by train; judgment for plaintiff reversed, defendant's knowledge of plaintiff's peril being necessary to be shown. (See former appeal, 2 Tex. Civ. App. 111.)

#### **Accidents at crossings.**

##### *Defective crossing — Liability of independent contractor.*

DALLAS & GREENVILLE R'Y CO. *v.* ABLE, 72 Tex. 156 (1888), injury sustained while driving over defective crossing; judgment for \$6,500

affirmed; see this case for ruling on liability of independent contractors, it being held (as per syllabus), that "a contractor building a railroad and undertaking to restore all public crossings is liable primarily to any one injured by his negligence, and is liable even to the railway company for any damages they may be compelled to pay by reason of want of care in restoring such crossings."

*Defective street-car track.*

HOUSTON CITY STREET R'Y CO. *v.* REICHART, 87 Tex. 539 (1895,) action by father for injuries to son who was riding in hose cart, driven by father (both parties being in fire department), the cart being upset by reason of alleged defective track; judgment for plaintiff reversed for erroneous instruction as to promise of railroad company to repair track.

*Horse killed — Defective track.*

In HOUSTON CITY STREET R'Y CO. *v.* AUTREY, 4 Tex. Civ. App. 635 (1893), it appeared that "plaintiff's horse came to its death without negligence of defendant, from a wound while being driven over defendant's railway, and which was inflicted by a nail, which had been used by defendant in constructing or repairing its track. Under these facts a judgment for damages for the injury is reversed." It was also held that defendant's knowledge of dangerous condition of track must be shown to constitute negligence on its part.

*Wagon upset at defective crossing.*

MISSOURI, KANSAS & TEXAS R'Y CO. *v.* CONNELLY, 14 Tex. Civ. App. 697 (1896), person driving across track injured by team and wagon falling into hole at crossing; judgment for plaintiff affirmed.

*Animals on track.*

Among the numerous Texas cases relating to killing of live stock on railroad tracks, see the following: INTERNATIONAL & GREAT NORTHERN R'Y CO. *v.* COCKE ET AL., 64 Tex. 151 (1885), cattle killed at crossing; INTERNATIONAL & GREAT NORTHERN R'Y CO. *v.* DUNHAM, 68 Tex. 231 (1887), cattle trespassing on track killed by train; INTERNATIONAL & GREAT NORTHERN R'Y CO. *v.* HUGHES, 68 Tex. 292, 81 Tex. 158; TEXAS CENTRAL R'Y CO. *v.* CHILDRESS, 64 Tex. 348; GULF, COLO. & SANTA FE R'Y CO. *v.* HODGE, 10 Tex. Civ. App. 543; GULF, COLO. & SANTA FE R'Y CO. *v.* BLANKENBECKER, 13 Tex. Civ. App. 249; EVANS *v.* GULF, COLO. & SANTA FE R'Y CO., 14 Tex. Civ. App. 437; HOUSTON & TEXAS CENTRAL R'Y CO. *v.* MULDROW, 54 Tex. 234.

## INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY V. KUEHN ET AL. (1)

*Court of Civil Appeals, Texas, Third District, January, 1893.*

[Reported in 2 Tex. Civ. App. 210.]

**CROSSING TRACK — PLEADING.** — 1. It is not always negligence to cross a railway track at a regular crossing in front of a moving train. All the facts and necessities of the occasion, the knowledge or means of knowledge of the person charged with negligence, are to be considered in deciding the question of negligence. See testimony held sufficient to support the allegation of negligence on part of the employees in charge of the railway train in a collision.

**DEPOSITIONS — PRACTICE.** — 2. Objections to answers in depositions because not responsive to the interrogatories cannot be made except by motion filed before announcement for trial.

**RES GESTÆ.** — 3. Complaints of existing suffering and exclamations of present pain are admissible as *res gesta*. Such complaints, however, are not competent when made after suit for such injuries.

**OBSTRUCTIONS TO VIEW OF TRACK.** — 4. That there were trees along the track obstructing the view of one approaching a public crossing, and who was injured in a collision at the crossing, is competent, whether alleged or not.

**OPINION EVIDENCE.** — 5. A witness not shown to be an expert cannot give his opinion in evidence that persons operating the train "could have stopped and not have hit the wagon had they driven slower."

**MEASURE OF DAMAGES.** — 6. In an action for damages by the widow and children of a man killed in a railway collision, it is competent to prove how much cotton and corn the deceased could raise in a year, and how much he could earn.

**APPROACH TO CROSSING — EVIDENCE.** — 7. It was error to admit testimony that the approach to the railway crossing (where the train collided with a wagon, causing injury) was too narrow to allow a wagon to turn around on it in safety. The facts only could be stated to the jury, and the jury should be left to their own conclusions.

**MORTUARY TABLES.** — 8. It seems that a witness testifying to the probable duration of the life from mortuary tables, should produce them, or they should be offered in evidence.

**DEATH OF PARENT — MEASURE OF DAMAGES.** — 9. The measure of damages which a minor child is entitled to recover against one negligently causing the death of his father, is "what he could reasonably expect to have received from the father during the probable duration of his life." It was error to admit testimony to the cost of raising a child in the county of the residence of the child. This was not a proper basis for damages.

1. See former appeal in *International Term*, 1888), where judgment for the & Great Northern R'y Co. v. Kuehn et al. plaintiffs (Kuehn) was reversed. *al.*, 70 Tex. 582 (Supreme Court, Austin

**SPEED OF TRAIN — FAILURE TO RING BELL AT CROSSING — EVIDENCE.** — 10. The customary rate of speed of the trains at the place at which the collision causing the injury occurred, is competent, as was the habit not to ring the bell at such crossing. It appeared that the injured party was well acquainted with the crossing, and the testimony was in conflict whether the bell was rung on the occasion of the collision and injury. (Official syllabus to the Report.)

**APPEAL from Comal.** The facts are stated in the footnote and also sufficiently appear in the opinion. *Judgment reversed.*

J. D. GUINN and Fiset & Miller, for appellant.

[No brief for appellees reached the State reporter.]

**Collard, ASSOCIATE JUSTICE.**— This is the second appeal of this case; the former is reported in 70 Tex. 582, to which we refer for statement of the case as there presented (1). The case went

1. In the former appeal in the Kuehn case, 70 Tex. 582, it appeared from the statement of facts and the opinion rendered by Walker, A. J., that on February 27, 1883, Julius Kuehn was traveling along the public highway, riding in a wagon and going to his home. At the railroad track north of the Gaudalupe river, a north-bound passenger train collided with his wagon and injured Kuehn severely in the head. Kuehn brought suit in the District Court of Bexar county for damages on account of the personal injuries received, and also for the value of his wagon and horses. This suit was dismissed by plaintiff at his own cost on October 3, 1883, and on February 27, 1884, a new suit, similar to the first, was brought in the District Court of Comal county, by other attorneys. In March, 1884, Julius Kuehn died at his home in Comal county, and on April 25, 1884, his widow, Fredericke Kuehn, for herself and minor children, brought suit against the railroad company for damages for the injuries resulting in the death of the husband. These two suits were afterwards consolidated. On September, 4, 1884, Fredericke Kuehn was married to Otto Nolte, and on December 8, 1885, the plaintiffs filed a second amended original petition, in lieu of the original peti-

tions already filed and amended petitions made thereto. In this last pleading she was joined *pro forma* by her husband, Otto Nolte, and Willis Kuehn and Herman Kuehn sued by their guardian and next friend, Otto Nolte. \* \* \* "The testimony shows that deceased was going home from the town of New Braunfels, near which he lived, by an old and much traveled public road with which he was well acquainted. The track of the defendant's railroad crossed the road he was traveling at nearly right angles. The track at the crossing, and for several hundred yards west of it, was upon an embankment variously estimated at from three to seven feet above the level. That to the right of deceased, and for a distance of 300 yards from the crossing upon the railroad track, there was an unobstructed view from the road on which he was traveling. Some blackberry trees grew along a fence north of the track and outside of the right of way, but these, being bare of leaves, made no material obstruction to the sight." \* \* \*

In the charge of the court was the following clause: "It is negligence in a railroad company to permit or suffer brush or tall weeds to grow upon its right of way so as to materially obstruct the view of approaching trains

to trial again upon the same amended petition upon which it was submitted before, and an amendment styled a trial amendment. On the last trial there was verdict and judgment thereon for plaintiffs, Mrs. Kuehn, now Mrs. Nolte, for \$1,500, and the two minor children, Willie Kuehn and Herman Kuehn, for \$2,000 each, or \$5,500 in all. Defendant has appealed.

The first assigned error is, that the court erred in overruling defendant's general demurrer to the petition, as amended by the trial amendment filed November 20, 1889, because it shows no cause of action.

The fifth assignment of error is to the effect that the court erred in overruling defendant's special demurrers to plaintiffs' pleadings, because they do not show proper precaution to prevent injury to deceased. Both of these assignments will be considered together.

On the former appeal it was held that the petition upon which the trial was had (the same now before us, the second amended petition, filed December 8, 1885), was good. Before the last trial, on November 20, 1889, plaintiffs filed what is styled a substitute for trial amendment, in which it is alleged that defendant and its servants saw deceased Kuehn attempting to cross the railway in ample time to have checked and stopped the train, prevented the accident, and saved the life of deceased, but that defendant moved on at a rapid rate, regardless of his safety, and failed and neglected to stop the train, although it could have done so. That Kuehn did not see the train until he was ascending the steep to cross the road, and at a time when he could not with safety turn to the right or left, and could not stop with safety. It was also alleged, that the place where the road crossed was level before the railway was built, "and that the company failed and neglected to leave the crossing in as good order as it was, or as it might have been."

by persons about to cross its track; and if the jury believe from the evidence that the defendant permitted and suffered brush and tall weeds, as alleged in plaintiff's petition to grow upon its right of way so as to materially obstruct the view of approaching trains by persons about to cross the railroad on the crossing in question,

and that but for such obstructions the injury would not have happened, then the defendant is liable in this case, unless you believe from the evidence that the deceased's own negligence directly contributed to the injury." This was held error, there being no testimony authorizing this issue. Judgment for plaintiffs reversed.

These allegations were made in addition to those of the amended petition:

In that it was shown that plaintiff was compelled to drive his wagon over the railway at the crossing in order to reach his home; "that the crossing was within the corporate limits of the city of New Braunfels, and the ordinances of the city required trains at that point not to exceed in speed the rate of six miles an hour, and that defendant had placed a signboard to that effect at the corporate limits," and the following: "On the said 27th day of February, 1883, at the point of intersection of the Seguin and New Braunfels road and defendant's railway there was a wagon crossing, which was constructed in an unskilful and negligent manner, and the top of the roadbed at said point of intersection was greatly above the level of the wagon road, and the dirt approaches to the wagon crossing were unusually and excessively steep and very difficult of ascent, and an unusual and unnecessary period of time was required for heavy vehicles to cross said track; and defendant had carelessly and negligently erected ditches, cattle guards, and fences on the side of the said crossing, so as to render the same very narrow, and dangerous for vehicles to back or turn to avoid a train of cars."

Other allegations are made, showing the collision, the injury, and such facts as would complete the statement of the case.

Taking all the allegations upon the subject in the amended petition and the trial amendment, it cannot be said that they show a case of contributory negligence on the part of deceased that would certainly prevent a recovery by plaintiffs, or that deceased failed to exercise such care as the occasion demanded. The amended petition on which the first trial was had was on former appeal held to be good. The additional fact set up in the trial amendment, that deceased saw the train while ascending the way to the crossing, when he could not turn to the right or left or stop with safety, does not conclusively show that the collision was caused by his negligence. His position and all his surroundings calling for care on his part must be considered. The steep and narrow approach, the danger of his wagon running backward if he stopped, the impossibility of turning with safety, the speed of the approaching train as he may have presumed it to be, according to the averment made, are all facts to be considered in connection with the time he is alleged to have seen the train. The distance of the train from him at the time he saw it

is not stated. It may be the jury, upon the facts, will conclude that he was guilty of contributory negligence in driving on after he discovered the train, but we are not prepared to say they could not do otherwise under the facts as stated. It is not always negligence to cross a railway track at a regular crossing in front of a moving train. All the facts and necessities of the occasion, the responsibility therefor, the knowledge or means of knowledge of the person charged with negligence, are to be considered in deciding the question. The petition presented a question for the jury if the facts stated are true, and not one that should be decided by the court on demurrer.

Before the trial, plaintiffs filed a motion to exclude parts of the answer of defendant's witness Jones, on the ground that the question suggested the answer, and assumed that the bridge was crossed, the bell rung, and the whistle blown. The answer of the witness was, that the train made a good deal of noise [crossing the bridge] and ringing the bell [and in the usual travel along the road]. The court struck out the portions of the answer in the above brackets. Defendant excepted, and assigns error that the question did not suggest the answer or assume the facts as stated.

There was an issue as to whether the bell was rung or the whistle blown; no dispute about crossing the bridge. The court allowed the only part of the answer that was subject to the objection, and which should have been stricken out, to stand and to be read to the jury.

Appellant insists that there was error in admitting, over defendant's objections, that part of witness Bartlett's answer to the seventh direct interrogatory, because the witness answered matter that was not responsive to the question asked. The witness was testifying by deposition. The objection was made on the trial, and not by motion before announcement. The objection, as stated in the assignment, was to the form and manner of taking the deposition, and could not be made, except by motion filed before announcement for trial.

There was an issue as to whether Kuehn died of the injuries received in the collision with the train, or of Bright's disease. Mrs. Nolte, formerly Mrs. Kuehn, was allowed to testify, over objection of defendant, that Kuehn complained of his wound from the time of the collision up to the time of his death. Error is assigned to the ruling, because his complaints are hearsay, and that he was making evidence for himself.

The rule is, that complaints of existing suffering and exclamations of present pain are admissible as *res gestæ*. If the complaints were made after Kuehn had brought this suit for damages, or after the litigation was in view, they would not be admissible. 1 Whart. Ev., § 268, and authorities cited; 1 Greenl. Ev., §§ 100, 102.

There was no error in admitting testimony that there were trees near defendant's right of way, or other obstructions preventing or interfering with the view of the train from the road where Kuehn was, whether the facts were alleged or not.

There was error in refusing to exclude the answer of the witness Beustedt, that "they [the persons operating the train] could have stopped and not have hit the wagon had they driven slower." The witness was not an expert; his answer was an invasion of the province of the jury.

It was not error to allow proof of how much cotton and corn Kuehn could raise in a year, and how much he could earn in dollars and cents. It was not error to allow a witness to state how long it would take a team to cross the railway dump on the crossing from the beginning of the approach. 1 Greenl. Ev. 61.

It was error to admit testimony that the approach was too narrow to allow a wagon to turn around on it with safety. The facts only could be stated to the jury. It was in proof that the ascent was steep, that the way was narrow; its dimensions were given; and it was shown that there was a precipice on each side, or at least steep sides, and that to back down the steep there was danger of running over the sides.

The question comes within the rule of the case of *Shelley v. City of Austin*, 74 Tex. 608. The jury should have been left to form their own conclusion from the facts. *Cooper v. State*, 23 Tex. 336; *Haynie v. Baylor*, 18 Tex. 509.

It is insisted that it was error to allow proof that defendant had a signboard about seventy-five yards northeast of the crossing, with a direction upon it, "Trains will not here exceed six miles an hour."

The petition alleged that there was such a signboard at the corporate limits; the proof showed that it was within the corporate limits, over a mile. It was not necessary to plead the fact at all; but having been pleaded, it is contended that it must be proved as alleged, and that there is a fatal variance in the averments and the proof. The gist of the allegation was, that by the



regulations of the company, trains were not allowed to run faster than six miles an hour at the place where Kuehn was hurt. The proof was responsive to this issue. It would be a very technical application of the rule to hold that there was an essential variance, and we do not think it should be so held. This difficulty can be easily obviated before another trial. 1 Greenl. Ev., §§ 56, 64.

In regard to the evidence of Hamilton, a life insurance agent, who testified that he was familiar with the Carlyle mortuary tables, and had worked under them, we may say, that while it is our opinion that an expert may give such testimony, it would have been more satisfactory if the tables themselves had been offered.

This same witness was permitted by the court, over objection of defendant, to state the cost of raising a child in Guadalupe county, and that it would cost \$10 per month. Defendant reversed exceptions to the ruling upon several grounds, among which was that the testimony did not give a proper basis for damage; and error is not assigned upon the same ground. The two minor children of deceased recovered each \$2,000 by the verdict and judgment. The testimony was clearly inadmissible. The measure of damages for these children was not what it would cost to board and educate them, but the pecuniary benefit they could reasonably expect to receive from their father during the probable duration of his life. To ascertain what they might reasonably expect to receive from him, proof of his age, circumstances, health, habits of industry, sobriety, economy, occupation, skill and capacity, and such like facts, would be admissible. He was under obligations to raise his children, and to see that they were supplied with necessities during their minority, but the cost of doing so would not be the measure of their legal loss by his death, in a suit therefor. It might be much less or much more. *Houston & Texas Central R'y Co. v. Cowser*, 57 Tex. 293, 300; *City of Galveston v. Barbour*, 62 Tex. 174; *March v. Walker*, 48 Tex. 375; *Southern Cotton Press & Mfg. Co. v. Bradley*, 52 Tex. 587, 601; *Winnt v. Internat. & G. N. R'y Co.*, 74 Tex. 32; *Texas-Mexican Central R'y Co. v. Douglass*, 69 Tex. 694; *Tex. & Pac. R'y Co. v. Lester*, 75 Tex. 56, 60; *Mo. Pac. R'y Co. v. Henry*, 75 Tex. 220, 224; *St. Louis, Ark. & Tex. R'y Co. v. Johnson*, 78 Tex. 536, 541.

We are not inclined to say that there was no evidence of gross negligence of defendant and its servants, and that the court should have so instructed the jury, as requested by the defendant.

In discussing the question of the degree of care to be used by a deaf person, who was struck while walking on a railway track, Chief Justice STAYTON says: "The fact that such was his condition made it the more necessary that he should not place himself in a place of danger." *Artusy v. Mo. Pac. R'y Co.*, 73 Tex. 191.

This is correct reasoning, but we do not think it would be proper to single out the fact and so instruct the jury, especially where the court, as in this case, has fully and carefully instructed the jury as to contributory negligence.

On the former appeal of this case, Justice WALKER, in speaking of the court's charge, said: "Having given a clear exposition of the law applicable to the facts, it was the court's duty to refuse charges asked upon the subject covered by the general charge upon the effect of isolated facts as negligence or not." 70 Tex. 582. The jury should be left to decide for themselves the meaning and force of the facts, unless made negligence *per se* by statute.

So we conclude there was no error in refusing the requested charge of defendant, that extra care was required of deceased in case his sight and hearing were defective.

Defendant also asked the court to instruct the jury that "when Kuehn was about to drive his wagon and team across the railway track, it was his duty to look and listen for an approaching train before attempting to cross the track, and not to drive carelessly into a place of possible danger; and if he failed to do so, and such failure contributed proximately to the injury, then plaintiffs cannot recover." This instruction again singles out a particular fact and argues it for the jury, and for that reason is objectionable.

The court, in the general charge, told the jury that "it was the duty of deceased to look out for the approach of the train, and to observe all reasonable precaution before attempting to cross the track." And again, "A person about to cross the track of a railway upon a public highway is bound to exercise all reasonable care and caution to avoid injury in crossing." Again the court charged: "You are instructed as a matter of law, that it is not the exercise of ordinary care and prudence for a person to drive with a team directly onto a railway crossing without making an effort to ascertain whether a train is approaching, or whether it is safe to drive on the track with his team."

This last charge was too much in favor of defendant; it told the jury, in effect, that certain acts would amount to negligence on the part of deceased.

There were other more general instructions upon the same subject. There was no error in refusing the special charge requested.

In the general charge the court instructed the jury that the deceased and the railway company had an equal right to cross the road at the point where the accident happened, and that the law imposes on both parties the duty of using reasonable and prudent precautions to avoid accident and danger; and while it was incumbent on the railway company, in running its train on the occasion referred to, to give the required signals by ringing the bell and sounding the whistle at least eighty rods before reaching the crossing, it was the duty of deceased to look out for the approach of the train, and to observe all reasonable precaution before attempting to cross the track.

This charge is objected to by appellant, because it declares that "both Kuehn and the defendant had equal rights to the crossing." This charge does not so declare; but it might have been so understood. The company has precedence in the use of its road and crossing, but that precedence is regulated by law. The respective rights of the company and the public are well understood, and are explained in so far as they are applicable to this case in other portions of the court's charge. The company's rights are recognized, and the jury by the charge are required to observe them. So qualified, and qualified by the company's precedent right to the use, there was no error in the charge. The supposed vice in the charge is, that it may have been construed to mean that deceased and defendant each had an equal right to cross at the same time.

In another special requested charge, the court is asked to tell the jury, that if Kuehn knew the crossing was bad, he should have been much more careful before attempting to cross. It was not necessary to so instruct the jury. A general charge upon the care to be used by the deceased was sufficient and correct.

It was not error to instruct the jury to the effect that if the signboard mentioned was near the crossing, Kuehn could presume that trains would not run faster than six miles an hour. But it would have been error to charge, as requested by defendant, that all testimony as to the signboard should be discarded from the consideration of the jury.

We do not think it incumbent upon us to decide as to the effect of the testimony offered to establish contributory negligence of Kuehn.

The witness Busch lived nearly one mile east of the crossing, near the railway track. He testified that he had often timed the speed of the trains in coming from the bridge to his house, and it took one minute and forty seconds. The crossing where Kuehn was hurt was between the bridge and witness' house.

The evidence was admissible to show the customary rate of speed of trains along by the crossing, traveling in the same direction of the train in question. It was shown that Kuehn lived near the crossing and often passed over it. The customary rate of speed of the train at this place was pertinent, as it gave him the right to regulate his conduct by it. For the same reason, it was not error to allow proof that it was the habit of persons operating the trains not to ring the bell in passing this crossing.

The evidence was admissible for the additional reason that it tended to prove that the bell was not rung on the occasion of the accident. There was a conflict in the testimony as to whether the bell was rung at the time or not; the testimony offered strengthened the probability that it was not rung. The fact was not a distinct collateral fact.

In the case of *Grand Trunk Railway Co. v. Richardson*, 91 U. S. 454, the question was whether the company's locomotive caused a fire. Testimony was admitted, over objections, "that at various times during the summer before the fire occurred, defendant's locomotives scattered fire when going past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire were among the number, and without showing that the locomotives were similar in their make, state of repair, or management to those claimed to have caused the fire complained of." Justice SHAW, delivering the opinion, said: "The question has often been considered by the courts in this country and in England, and such has, we think, been generally held admissible, as tending to prove the possibility and the consequent probability that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railway company." 1 Whart. Ev., §§ 40, 41, 42, 43.

If special acts are admissible to show a habit of negligence, as decided in the foregoing case, the habit itself would undoubtedly be. There was no error in admitting the testimony.

Other errors assigned need not be noticed, as the questions will not probably arise on another trial.

Because of the errors committed on the trial, as before noted, the judgment of the lower court should be reversed and the cause remanded; and it is so ordered.

Reversed and remanded.

## MEXICAN NATIONAL RAILWAY COMPANY v. CRUM.

*Court of Civil Appeals, Texas, Fourth District, March, 1894.*

[Reported in 6 Tex. Civ. App. 702.]

**NEGLIGENCE—DEFINITION.**—1. Negligence constituting a cause of action is such an omission by a responsible person to use that degree of care, diligence and skill which it was his legal duty to use for the protection of another person from injury, as in a natural and continuous sequence causes unintended damage to the latter.

**ESSENTIAL ELEMENT—PLEADING—PROOF.**—2. An essential element in negligence is a duty. If there is no duty there can be no negligence, and to recover in an action for negligence, plaintiff must allege and prove facts sufficient to show what the duty is, and that the defendant owed it to him.

**DUTY OF RAILROAD COMPANY.**—3. The duty upon the part of a railway company, the nonperformance of which is the essential element of its negligence, is dependent upon the relation between the individual injured and the company, and may be affected by the mental or physical incapacity of the individual, and in some cases by the circumstances under which the injury was inflicted.

**DAMAGES—PLEADING—PROOF.**—4. Where an action for damages is brought for alleged physical injuries to a child of tender years, while standing in the door of a freight car belonging to appellant, the defendant company, and the pleadings of plaintiff allege that the child was standing there "by the invitation of and with the consent and knowledge of the appellants' servants," at the time of his alleged injury: *Held*, that to make appellant liable to him for its nonperformance of any duty, it must have been within the scope of the authority of appellant's servants who gave such invitation or consent, if given, to have done so.

**CHILD INJURED ON FREIGHT CAR—COLLISION—DEGREE OF CARE REQUIRED.**—5. Where a child of tender years is injured while standing in the door of a freight car belonging to appellant, the defendant company, the degree of care to be exercised by said company depends upon the circumstances under which the child came there, to wit:

- a. If he was in the car at the invitation, express or implied, of the servants of the appellant, it was the duty of appellant and its servants to exercise ordinary care towards the child to prevent him from being injured, and to abstain from doing any act which would reasonably result in his injury, taking into consideration his tender years.
- b. If he was there merely with the consent and knowledge of appellant's servants in control of the cars, and engaged in transferring freight, a different rule for measuring the company's duty would obtain. Mere permission or acquiescence of appellant or its servants in his being in the car would create no duty on the part of the appellant except to refrain from acts wilfully and knowingly injurious to him.
- c. If he was not upon the car at the invitation of the company, or by its permission, he was an intruder, and in that event he was not entitled to recover except for injuries knowingly and wilfully inflicted.

TRESPASSER — QUESTION FOR JURY. — 6. It is for the jury to determine from the evidence under an appropriate charge, where a child of tender years is injured while in a freight car of the defendant company (appellant), whether he was rightfully on the cars, as alleged, or was there merely as a trespasser (1).

(Official syllabus to the Report.)

APPEAL from District Court, Webb County. The facts appear in the opinion. *Judgment reversed.*

NICHOLSON, DODD & MULLALLY and DEIRMAN & FRANKLIN, for appellant.

C. C. PIERCE, for appellee.

Neill, J. — The appellee, Charles Crum, a minor, by his next friend, Elena Garza, sued the appellant for \$30,000 damages for personal injuries alleged to have been inflicted upon him by the negligence of appellant. The plaintiff alleges in his petition as his cause of action: "That amongst other railroads entering and doing business with defendant in the city of Laredo, where plaintiff was injured, was the International and Great Northern Railroad Company, whose track was a broad gauge, whilst the track of defendant was a narrow gauge, and, owing to the difference in the gauges of the said two tracks, when freight was brought by either of said companies, intended to be delivered to the other, the same was transferred from the cars of one to the cars of the other by running the broad-gauge car on a side track of defendant, and opposite to one of defendant's cars on its track. That a platform or gang plank was then extended from one car to the other, and the freight transferred over said gang plank from one of said cars to the other. That said side tracks were

1. See notes of Texas cases, at end of this case, relating to accidents to children on tracks.

located in a populous portion of the city of Laredo, and entered over and across several streets thereof. That said side tracks were also used by defendant in placing loaded cars thereon, and permitting them to be unloaded by its customers. That when parties are thus engaged in transferring, exchanging or receiving freight on said sidings from or into the cars of defendant, and especially when platforms or gang planks are being used as aforesaid, and persons are passing to and from between said cars, or otherwise engaged in or about said cars or thereabouts, the management, movement, and handling of defendant's engines and cars upon said sidings is hazardous and dangerous to persons so engaged as aforesaid, and by reason thereof it was the duty of defendant to exercise due caution and care in the management, movement, and handling of its cars and engines on said sidings, and to give due notice and warning in some reasonable manner to persons thus engaged in and about said cars, or that might be there by invitation, consent or license of defendant, of any contemplated movement or handling of said cars and engines, so that no injury might occur to them, and so that they could place themselves in positions of safety. That plaintiff was a male minor of tender years, to wit, about seven years. That on the 27th day of January, 1893, defendant had some six or seven cars placed on the siding aforesaid, for the purpose of transferring, exchanging, and delivering freight into and from the cars of the International and Great Northern Railroad Company, and a large number of defendant's servants and employees, and other persons who were there by the consent and invitation of defendant, were employed in and about said cars thereat. That said cars of defendant were not coupled together, but located at different points on said siding, from three to six feet apart. That plaintiff was, on said date, by the invitation of and with the consent and knowledge of defendant's servants and employees, and of other persons who were there by consent and invitation of defendant, as aforesaid, standing in the door of a broad-gauge car, which was connected to a car of defendant's by a platform or gang plank, as aforesaid, and standing within a few yards of a street, and in which a large number of defendant's employees and servants and other persons there by invitation and consent of defendant, were transferring corn into said narrow-gauge car of defendant, and otherwise engaged. That defendant carelessly and negligently, and without the exercise of due care and caution,

and without warning or notice of any kind, caused its cars to be moved upon said siding, with great force and violence against a car which was connected by a platform to the car on which plaintiff was standing. That the force of said blow moved defendant's said car, carried with it the platform or gang plank with such rapidity and violence that plaintiff's feet were caught between the side of the door and said gang plank and crushed. That the injury to plaintiff could have been prevented by defendant, by the exercise of care and caution, and that its failure to exercise such care and caution, and to give notice and warning to plaintiff of the intended movement of its cars, as it was its duty to have done, was negligence on its part which was the proximate cause of the injuries received by plaintiff." The answer of defendant consisted of a general denial and a special allegation that, if plaintiff was injured, his injuries were not caused by any fault of defendant, its agents or servants.

All the assignments of error necessary for us to consider in disposing of the case relate to the charge of the court, and its refusal to give certain special charges asked by the defendant. After stating the issues raised by the pleadings, the charge is: "Negligence, in its legal sense, means the failure to use ordinary care in performing a duty, which failure is the proximate cause of injury to a person to whom the duty was due. Negligence, to some extent, should be measured by the character, risk and exposure incident to the business under consideration, and the degree of care is higher when the lives and limbs of persons are endangered than in ordinary cases. Whether or not the defendant in this case was negligent, it is your duty to determine from all the evidence; and in this connection you should consider the testimony, if any, in regard to the duty of the men employed by the defendant in moving its cars. the precautions they should take to avoid injury to persons engaged in transferring freight from broad-gauge to narrow-gauge cars under the circumstances of this case. And if you believe from the evidence that the defendant had laborers engaged in transferring freight from a broad-gauge car to its own cars over a gangway, which connected said cars together, and that it was dangerous to the lives and limbs of said laborers for the defendant's switch engine to move said cars without first warning said laborers of the approach of the engine, and causing said gangway to be removed; and you further believe that the servants of defendant in charge of its



located in a populous portion of the city of Laredo, and entered over and across several streets thereof. That said side tracks were also used by defendant in placing loaded cars thereon, and permitting them to be unloaded by its customers. That when parties are thus engaged in transferring, exchanging or receiving freight on said sidings from or into the cars of defendant, and especially when platforms or gang planks are being used as aforesaid, and persons are passing to and from between said cars, or otherwise engaged in or about said cars or thereabouts, the management, movement, and handling of defendant's engines and cars upon said sidings is hazardous and dangerous to persons so engaged as aforesaid, and by reason thereof it was the duty of defendant to exercise due caution and care in the management, movement, and handling of its cars and engines on said sidings, and to give due notice and warning in some reasonable manner to persons thus engaged in and about said cars, or that might be there by invitation, consent or license of defendant, of any contemplated movement or handling of said cars and engines, so that no injury might occur to them, and so that they could place themselves in positions of safety. That plaintiff was a male minor of tender years, to wit, about seven years. That on the 27th day of January, 1893, defendant had some six or seven cars placed on the siding aforesaid, for the purpose of transferring, exchanging, and delivering freight into and from the cars of the International and Great Northern Railroad Company, and a large number of defendant's servants and employees, and other persons who were there by the consent and invitation of defendant, were employed in and about said cars thereat. That said cars of defendant were not coupled together, but located at different points on said siding, from three to six feet apart. That plaintiff was, on said date, by the invitation of and with the consent and knowledge of defendant's servants and employees, and of other persons who were there by consent and invitation of defendant, as aforesaid, standing in the door of a broad-gauge car, which was connected to a car of defendant's by a platform or gang plank, as aforesaid, and standing within a few yards of a street, and in which a large number of defendant's employees and servants and other persons there by invitation and consent of defendant, were transferring corn into said narrow-gauge car of defendant, and otherwise engaged. That defendant carelessly and negligently, and without the exercise of due care and caution,

and without warning or notice of any kind, caused its cars to be moved upon said siding, with great force and violence against a car which was connected by a platform to the car on which plaintiff was standing. That the force of said blow moved defendant's said car, carried with it the platform or gang plank with such rapidity and violence that plaintiff's feet were caught between the side of the door and said gang plank and crushed. That the injury to plaintiff could have been prevented by defendant, by the exercise of care and caution, and that its failure to exercise such care and caution, and to give notice and warning to plaintiff of the intended movement of its cars, as it was its duty to have done, was negligence on its part which was the proximate cause of the injuries received by plaintiff." The answer of defendant consisted of a general denial and a special allegation that, if plaintiff was injured, his injuries were not caused by any fault of defendant, its agents or servants.

All the assignments of error necessary for us to consider in disposing of the case relate to the charge of the court, and its refusal to give certain special charges asked by the defendant. After stating the issues raised by the pleadings, the charge is: "Negligence, in its legal sense, means the failure to use ordinary care in performing a duty, which failure is the proximate cause of injury to a person to whom the duty was due. Negligence, to some extent, should be measured by the character, risk and exposure incident to the business under consideration, and the degree of care is higher when the lives and limbs of persons are endangered than in ordinary cases. Whether or not the defendant in this case was negligent, it is your duty to determine from all the evidence; and in this connection you should consider the testimony, if any, in regard to the duty of the men employed by the defendant in moving its cars, the precautions they should take to avoid injury to persons engaged in transferring freight from broad-gauge to narrow-gauge cars under the circumstances of this case. And if you believe from the evidence that the defendant had laborers engaged in transferring freight from a broad-gauge car to its own cars over a gangway, which connected said cars together, and that it was dangerous to the lives and limbs of said laborers for the defendant's switch engine to move said cars without first warning said laborers of the approach of the engine, and causing said gangway to be removed; and you further believe that the servants of defendant in charge of its

switch engine approached the cars while being so loaded, and moved them with said engine, without giving warning or notice to the laborers engaged in transferring freight, and that by reason thereof the feet of the plaintiff were caught by said gangway; and that he was injured, as alleged, without any fault on his part — then you should find for plaintiff. But if you believe that the plaintiff had been cautioned by the servants of the defendant that it was dangerous to be at or near the cars, and had been warned to keep away from them; and you further believe that the plaintiff had sufficient discretion and intelligence to understand such caution and warning, and that he was there against the will and consent of the defendant — then the plaintiff cannot recover, although he may have gone into the car at the request of the witness, Leonardo Lopez, who was not a servant of the defendant, and even though you may believe defendant's servants may have been negligent in not giving warning to the laborers of the approach of the engine. If you believe that the plaintiff is entitled to recover under this charge, then you may allow him such a sum in money as you may believe will reasonably compensate him for any bodily or mental pain he may have suffered, or may continue to suffer, by reason of said injuries."

At the instance of defendant, the following special charges were given: 1. The burden of proof is on the plaintiff to show by a preponderance of the evidence that he was injured, and that such injuries were caused by the negligence of the defendant company. 2. The jury are instructed that in the event they believe from the evidence and from the general appearance and manner of plaintiff that he knew it was wrong for him to go on, under, or about defendant's cars, and that he had been warned and driven away from said cars only a short time previous to his injury, and that, notwithstanding said warning, he went upon one of the cars by direction or invitation of some person other than an employee of defendant, and that he was not discovered by the employees of defendant until it was too late to extricate him from his perilous position, then you will find for defendant, notwithstanding the train crew, in striking and moving the car which was connected by platform with the one plaintiff was in, may have violated a duty defendant owed to the men engaged in transferring corn from the car where plaintiff was hurt to one of defendant's cars. 3. If you believe from the evidence, that

defendant's employees struck one of its cars on a track, and thus moved a platform extending from said car to a car in which plaintiff was standing, and that said car was struck by said employees without any warning to the persons therein or persons in the car in which plaintiff was standing, and the striking of said car was, under all circumstances, negligence on the part of the employees so doing, and that plaintiff was injured thereby, nevertheless, you will find for defendant if you believe from the evidence that plaintiff was in a dangerous position at the time, and knew it was a dangerous one, and understood the nature, character and extent of the danger, and was possessed of sufficient discretion to have avoided such danger, and had voluntarily put himself in such a dangerous position, and would not have been injured if he had not been in such position."

The second paragraph, as above copied, is complained of by the appellant, because: 1. It directs the jury to consider testimony bearing upon particular facts, makes such testimony unduly prominent, and thereby invades the province of the jury to disregard testimony if they did not believe it true, and is on the weight of evidence. 2. It measures the duty of defendant to plaintiff by its duty to others occupying a different and distinct relation to defendant than that occupied by plaintiff, and required and authorized the jury to consider the question of negligence of defendant to plaintiff, not in the light of any duty the former owed the latter, but solely in the light of a duty owed others, occupying the relation of servants of defendant. And, 3, because defendant owed plaintiff no duty, provided the jury believed plaintiff a trespasser.

And it is urged that the court erred in the third paragraph of its charge in this: 1. It directs the jury that if it finds certain facts, to find for the plaintiff, instead of leaving it for the jury to decide whether, under all the circumstances of the case, the acts of the defendant, complained of, amounted to negligence, and that, as a result of such negligence, plaintiff was injured, and, therefore, invades the province of the jury. 2. It directs the jury to measure the liability of defendant to plaintiff by the duty it may have owed to its employees, instead of informing the jury in plain, distinct, and unequivocal language that plaintiff's right to recover rested wholly upon the failure of defendant to discharge some duty it owed to plaintiff. 3. It authorized the jury to find for plaintiff, although the employees of defendant

may not have known the presence of plaintiff, nor been able to discover said presence by the exercise of ordinary care. 4. It assumes that plaintiff, when injured, occupied the same relation towards defendant as the laborers engaged in transferring freight from the car in which plaintiff was standing when injured, and that defendant owed him duties and obligations, whereas, in law, the defendant owed him no duty other than such as it owed the public.

Negligence constituting a cause of action is such an omission, by a responsible person, to use that degree of care, diligence and skill which it was his legal duty to use for the protection of another person from injury as, in a natural and continuous sequence, causes unintended damage to the latter. *Shear. & R. Neg.*, § 3.

An essential element of negligence is a duty. If there is no duty, there can be no negligence. *Carpenter v. City of Cohoes*, 81 N. Y. 21; *Tourtellot v. Roesbrook*, 11 Metc. (Mass.) 460.

To recover in an action for negligence, the plaintiff must allege and prove facts sufficient to show what the duty is, and that the defendant owed it to him. *Shear. & R. Neg.*, § 8; *Sweeny v. Old Colony, etc., R'y Co.*, 92 Mass. 368, 372 (12 Am. Neg. Cas. 75, n).

It is not sufficient to show that a defendant owed a duty which it failed to discharge to some one or class of persons other than the plaintiff. But it must be proved that there existed a duty to the plaintiff, which the defendant failed to discharge, and that his failure to discharge the duty was the proximate cause of the damage to plaintiff. The duty upon the part of a railway, the nonperformance of which is the essential element of its negligence, is dependent upon the relation between the individual injured and the railway, and may be effected by the mental or physical incapacity of the individual, and, in some cases, by the circumstances under which the injury was inflicted. Thus a railway does not owe a like duty to its passengers, to its servants, to persons who come upon its premises as mere licensees, and to persons who trespass upon its premises; nor does the railway in all cases owe a like duty to adults and to infants. *Patt. Ry. Acc. Law*, § 2.

What duty, if any, is alleged by the appellee to have been due him from the appellant? Did the duty, as alleged, exist? And, if so, did the appellant fail to perform it? are the questions to

be considered and determined from the pleadings and evidence in this case. Their consideration involves the correctness of the charge complained of, and they must be determined from the relation that existed between the parties at the time of the alleged injury, and all the facts and circumstances attending the transaction.

The appellee alleged that he was, by the invitation of, and with the consent and knowledge of, appellant's servants, and other persons, who were there by consent and invitation of appellant, standing in the door of a car of the International and Great Northern Railway Company, which was connected to one of appellant's cars by a gang plank, into which appellant's servants and other persons were transferring corn from appellant's car, so connected with it. That it was the duty of appellant to exercise due care in the management and movement of its cars, and give due notice and warning in some reasonable manner to persons engaged in and about said cars, or that might be there by invitation, consent or license of defendant, of any contemplated movement or handling of said cars or engine, so that no injury might occur to them, so that they could place themselves in positions of safety. And that appellant carelessly and negligently, and without the exercise of due care and caution, and without warning or notice of any kind, caused its cars to be moved with great force and violence against a car which was connected by a gang plank with the car on which appellee was standing, and that the force of the impact moved appellant's car, carrying with it the gang plank, with such violence that appellee's feet were caught and crushed between the door of the car and gang plank. If, then, from the appellee's pleadings, the appellant owed him any duty, it must have been from the fact that he was, "by the invitation of, and with the consent and knowledge of, appellant's servants, standing in the door of the broad-gauge car" at the time of his alleged injury. And to create such duty, and make the appellant liable to him for its nonperformance, it must, in our opinion, have been within the scope of the authority of appellant's servants who gave such invitation or consent (if given) to have done so.

If the appellee was on the car and in the position alleged at the invitation, either express or implied, of the servants of the appellant, it was the duty of appellant and its servants to exercise ordinary care towards the appellee to prevent his being

injured, and to abstain from doing any act which would reasonably result in his injury, taking into consideration his tender years.

If he was there merely with the consent and knowledge of appellant's servants in control of the cars, and engaged in transferring freight, a different rule for measuring appellant's duty to him would obtain. Mere permission or acquiescence of the appellant or its servants in his being on the car would create no duty on the part of appellant except to refrain from acts wilfully or knowingly injurious to him (1 Thomp. Neg. 303); and to impose this duty we think that it would be necessary for the servants doing the act from which it is claimed the injury resulted to know or have reasonably anticipated that appellee was in a position from which the injury caused by the act might flow as a natural consequence.

If the appellee was not upon the car at the invitation of appellant, or by its permission, he was an intruder, and, in that event, he was not entitled to recover, except for injury knowingly or wilfully inflicted; for his action was founded upon his right to be on the car, and not upon appellant's servants negligently permitting him to enter a place of danger, as in the case of *Cook v. Houston Direct Navigation Co.*, 76 Tex. 353, cited by his counsel.

And it was for the jury to determine from the evidence under an appropriate charge whether he was rightfully on the cars as alleged, or was there merely as a trespasser.

There is nothing in the evidence to warrant the inference of an implied invitation on the part of the railroad to a boy of seven years old to go on its car, where its employees were busily engaged in handling freight, where he would be in the way, and liable to get hurt. It was a place where boys of his age could, as a general thing, have no business, and there can be no implication that they were invited there. Nor do we think that the evidence is sufficient to show that the appellee was on the car where he was hurt at the express invitation of any one shown to have authority to invite him there. If, however, there was any evidence of an implied or express invitation to appellee, from the company or its authorized agents, to go on the car, it should have been submitted to the jury, and, if it found he was there by such invitation, the court should have instructed the jury as to appellee's duty to him, and as to the measure of its liability

to him if it failed to perform it. If he was there by mere permission, the jury should have been informed of the appellant's duty to him in that event, and the extent of its liability, if it failed to discharge such duty and appellee was injured in consequence of such failure. If the appellee was there as an intruder, the jury should have been informed that under his pleadings he was not entitled to recover.

If, therefore, we are correct in our view of the law applicable to the pleadings and facts in this case, it follows that the objections urged by appellant to the charge of the court are well taken. It is clear that the errors in the charge are not cured by the special charges given at appellant's request, and that the errors complained of are of such a character as require a reversal of the judgment of the District Court.

Reversed and remanded.

#### NOTES OF TEXAS CASES RELATING TO INJURIES TO CHILDREN, ARISING OUT OF ACCIDENTS ON TRACK.

Among the numerous Texas cases relating to Accidents to Children at Crossings or on Tracks, are the following:

##### *Children run over at crossings.*

GALVESTON, H. & H. R'Y CO. *v.* MOORE, 59 Tex. 64 (1883), child, six years old, run over by train at street crossing; judgment for \$2,091 affirmed; it was held that "the negligence of the parent in sending the child, unattended, on an errand, which required it to cross the railway track, cannot be imputed to the child or affect its right to recover for injury sustained. It will only be chargeable with such discretion in realizing and avoiding danger as a child would exercise."

HOUSTON & TEXAS CENTRAL R'Y CO. *v.* BOOZER, 70 Tex. 537 (1888), boy, twelve years old, run over by train while crossing track at crossing; judgment for plaintiff for \$5,000 affirmed.

TEXAS & PACIFIC R'Y CO. *v.* HALL, 83 Tex. 675 (1892), boy, fourteen years of age, run over and killed by train at crossing; judgment for \$2,500 affirmed.

CALHOUN ET AL. *v.* GULF, COLORADO & SANTA FE R'Y CO., 84 Tex. 230 (1892), child, twelve years old, killed while crossing track; obstruction on track; judgment for defendant affirmed; rehearing denied.

THOMPSON *v.* MISSOURI, KANSAS & TEXAS R'Y CO., 11 Tex. Civ. App. 307 (1895), child trespassing on freight train at crossing and run over; judgment for defendant reversed.



*Children run over on track.*

In *TEXAS & PACIFIC R'Y CO. v. O'DONNELL*, 58 Tex. 27 (1882), child, eighteen months old, run over on track, and arm injured; judgment for \$8,000 affirmed; "a railroad company is responsible for an injury to a child trespassing on its track, where the injury might have been prevented had the employees of the company used ordinary care in keeping an outlook."

In *DOUGLASS v. CENTRAL TEXAS & NORTHWESTERN R'Y CO.*, 90 Tex. 125 (1896), it appeared (as per syllabus), that "a train of twenty flat cars stopped for fifteen minutes in front of a house fifty feet from the track. When it started again, the plaintiff, a child less than two years old, was beneath the cars and was injured. The child was not seen by any of the trainmen, unless about the time the train stopped, when it was on the porch of the house. *Held*, that there was no evidence of negligence on the part of the employees of the railway company." Judgment for plaintiff reversed by Court of Civil Appeals, and the latter affirmed by Supreme Court.

*SAN ANTONIO & ARANSAS PASS R'Y CO. v. VAUGHN*, 5 Tex. Civ. App. 195 (1893), child, nineteen months old, run over and killed by train; judgment for plaintiff for \$2,000 affirmed.

*INTERNATIONAL & GREAT NORTHERN R. R. CO. v. TABOR*, 12 Tex. Civ. App. 283 (1896), boy, between thirteen and fourteen years of age, passing along path usually followed by railway employees, through switch yard, finding same blocked, climbing over bumpers of freight train and injured by train backing; judgment for plaintiff for \$2,000 affirmed.

*HOUSTON & TEXAS CENTRAL R. R. CO. v. NIXON*, 52 Tex. 19 (1879), child, between four and five years of age, run over by train while playing under a culvert bridge on track at street crossing; judgment for plaintiff reversed for erroneous instructions.

*Child walking on railway trestle — Negligence of parent not imputable to child.*

*TEXAS & PACIFIC R'Y CO. v. FLETCHER*, 6 Tex. Civ. App. 736 (1894), girl, seven years old, while being led over railway trestle, under direction of her mother, knocked off trestle by train; judgment for plaintiff affirmed; under the evidence, *held*, that the child not guilty of contributory negligence and that her tender years should exempt her from liability; *held*, also, that negligence of parent in exposing child to danger cannot be imputed to child, to prevent recovery for the child's benefit."

*Child injured at depot — Playing on cars.*

*WILLIAMS v. TEXAS & PACIFIC R. R. CO.*, 60 Tex. 206 (1883), child,

eight years old, playing on platform at defendant's depot and jumping on and off moving cars, run over and killed; judgment for defendant affirmed.

*Child injured on turntable.*

EVANSICH *v.* GULF, COLORADO & SANTA FE R'Y CO., 57 Tex. 129 (1882), child injured on turntable; judgment of dismissal of complaint reversed.

See, also, GULF, COLORADO & SANTA FE R'Y CO. *v.* MCWHIRTER, 77 Tex. 356 (1890), child, playing on turntable; judgment for plaintiff for \$1,233.33 affirmed; motion for rehearing overruled.

*Child injured in collision between trains.*

TEXAS CENTRAL R'Y CO. *v.* STUART, 1 Tex. Civ. App. 642 (1892), child, three years old, traveling with mother on passenger train, injured in collision; judgment for plaintiff reformed and affirmed; motion for rehearing overruled.

*Child run over by street car.*

GALVESTON CITY R. R. CO. *v.* HEWITT, 67 Tex. 480 (1887), child, nineteen months old, run over by street car and spine permanently injured; judgment for \$7,500 affirmed.

NOTES OF TEXAS CASES RELATING TO PEDESTRIANS  
INJURED AT CROSSINGS OR ON RAILROAD TRACKS.

Among the numerous Texas cases relating to Injuries to Pedestrians at Railroad Crossings or on Tracks are the following:

**Persons injured at crossings.**

BROWN (RECEIVER OF TEXAS & PACIFIC R'Y CO.) *v.* GRIFFIN, 71 Tex. 659 (1888), person crossing track struck by train; judgment for plaintiff for \$4,400 affirmed.

ST. LOUIS & TEXAS R'Y CO. *v.* CROSNOW, 72 Tex. 83 (1888), person crossing track at place habitually used by public as crossing, struck by train; judgment for plaintiff affirmed.

TEXAS & PACIFIC R'Y CO. *v.* LAVERTY, 4 Tex. Civ. App. 74 (1893), person knocked down by freight train at street crossing and fingers injured; judgment for plaintiff for \$7,000 affirmed.

GULF, COLORADO & SANTA FE R'Y CO. *v.* MOSS, 4 Tex. Civ. App. 318 (1893), person struck by locomotive while crossing track; judgment for plaintiff reversed; contributory negligence; "it is a want of due care to knowingly attempt to cross a railway track without looking to see if cars are approaching."

INTERNATIONAL & GREAT NORTHERN R'Y CO. *v.* DE BAJLIGETHY, 9 Tex. Civ. App. 108 (1894), person crossing track struck and killed by train; judgment for plaintiff.

**Crossing track at depot.**

*GALVESTON, HARRISBURG & SAN ANTONIO R'Y CO. v. BRACKEN*, 59 Tex. 71 (1883), plaintiff's husband run over by defendant's train, while crossing track at depot; judgment for plaintiff reversed on the ground of insufficient evidence to sustain verdict.

*HOUSTON & TEXAS CENTRAL R'Y CO. v. BRIN*, 77 Tex. 178 (1890), person crossing track at depot, struck by train; judgment for plaintiff reversed; there being no statutory duty on part of railway company to ring bell or blow whistle on starting trains at crossings (R. S., art. 4232).

**Persons walking along railroad track.**

*HOUSTON & TEXAS CENTRAL R. R. CO. v. SMITH*, 52 Tex. 178 (1879), person walking along track run over by train; judgment for plaintiff for \$5,000 reversed. "The law presumes that a person walking upon a railroad track will leave the same in time to prevent injury from an approaching train of which he has knowledge, or should have, by the ordinary use of the senses of hearing and seeing, and the managers of the train may act upon this presumption."

*HOUSTON & TEXAS CENTRAL R'Y CO. v. RICHARDS*, 59 Tex. 376 (1883), person walking at night between road crossings, stepping on railway ties and struck by engine, he knowing that engine was due; judgment for plaintiff reversed, the evidence not warranting verdict for damages. "He who seeks damage for injury inflicted by another cannot recover if he has himself contributed to it."

In *GALVESTON, HARRISBURG & SAN ANTONIO R'Y CO. v. RYON*, 70 Tex. 56 (1888), person standing on the end of a cross-tie on railroad track looking at his feet and scraping the mud from them, struck by engine and fatally injured, judgment for plaintiff was reversed. The syllabus states the point decided as follows: "If one who is injured by a passing railway train, while upon a railroad track, went upon it under such circumstances as rendered him guilty of negligence, the railway company will not be liable in damages on account of the failure of its servants, who are operating the train, to discover his position in time to avoid the injury, nothing having intervened between the time of his going on the track until the time when he was injured to relieve his act in going on the track from its culpability."

See, also, subsequent appeal in the *RYON* case, 80 Tex. 59 (1891), where judgment for plaintiff was again reversed on ground of contributory negligence, reaffirming former ruling in 70 Tex. 56.

In *ARTUSY ET AL. v. MISSOURI PACIFIC R'Y CO.*, 73 Tex. 191 (1889), plaintiff's intestate, who was hard of hearing, walking along

railroad track and struck by train, judgment for defendant was affirmed on ground of contributory negligence of injured party.

See, also, *MISSOURI PACIFIC R'Y CO. v. WEISEN*, 65 Tex. 443 (1886), where person walking along track was struck by train, but the persons in charge of train, after knowledge of his peril, failed to lessen the speed of train to avert injury. In the *WEISEN* case, judgment for plaintiff for \$500 was affirmed.

*GULF, COLORADO & SANTA FE R'Y CO. v. YORK*, 74 Tex. 364 (1889), person walking along track, struck by train; judgment for plaintiff reversed for erroneous instructions on point where there was no evidence.

*GULF, COLORADO & SANTA FE R'Y CO. v. ANDERSON*, 76 Tex. 251 (1890), person walking on track at or near crossing, struck by train; judgment for plaintiff for \$6,000 affirmed.

*TEXAS & PACIFIC R'Y CO. v. ROBINSON*, 4 Tex. Civ. App. 121 (1893), intoxicated person run over and killed on track by freight train; judgment for plaintiff affirmed; motion for rehearing denied; engineer testified that he blew whistle when he saw person on track, but assuming that the person would clear the track, he made no effort to check train; *held*, that failure of engineer to check train was negligence, for which defendant was liable.

#### **Persons lying on track.**

In *HOUSTON & TEXAS CENTRAL R'Y CO. v. SYMPKINS*, 54 Tex. 615 (1881), person run over by train, while lying in an insensible condition on track, judgment for plaintiff was reversed for erroneous charge as to duty and liability of railroad company in regard to persons on track. It was also held that the court should have granted defendant's request to instruct the jury as to the railroad's duty in the event they found plaintiff was intoxicated at the time of the accident. Whether he was so intoxicated, was a question of fact for the jury. If they found that his fit of insensibility was one of intoxication, the authorities seem to be that "such conduct is contributory negligence, which constitutes a bar to his action for damages."

*MISSOURI PACIFIC R'Y CO. v. BROWN*, 75 Tex. 268 (1889), plaintiff's son, lying on track, run over and killed by train; judgment for plaintiff reversed for erroneous charge as to duty of railway company to exercise ordinary care and caution.

## COLLISION AND CROSSING CASES IN UTAH.

**Collision between wagon and train at crossing—Failure to give statutory signal.**

In *BITNER v. UTAH CENTRAL R'Y Co.*, 4 Utah, 502 (1886), collision between wagon and train at crossing, judgment for plaintiff for \$5,000 was affirmed. The syllabus states the case as follows: "The failure to ring the bell or sound the whistle at crossing of highways, as required by § 2350, Compiled Laws, Utah, 1888 (§ 494, Compiled Laws, 1876), is such statutory negligence as will, in the absence of contributory negligence, render the railroad company liable for injuries resulting from a collision to a person in a wagon crossing the track." *Held*, also, that "a verdict of \$5,000 damages for injuries to a middle-aged man of previous good constitution, where he would probably suffer more or less from injuries during life, is not excessive."

*Collisions between wagons and trains at crossings.*

*OLSEN v. OREGON SHORT LINE & UTAH NORTHERN R'Y Co.*, 9 Utah, 129 (1893), collision between wagon and train at crossing; judgment for plaintiff affirmed; negligence of railroad company not to comply with statutory requirement as to signals when approaching crossings.

*SMITH v. RIO GRANDE WESTERN R'Y Co.*, 9 Utah, 141 (1893), collision between wagon and train at crossing; judgment for plaintiff for \$3,500 affirmed.

*LEAK v. RIO GRANDE WESTERN R'Y Co.*, 9 Utah, 246 (1893), teamster hauling ore from mines and placing it in defendant's cars, and he and his wagon struck by freight cars running by force of gravity onto switch track, on which was plaintiff's wagon; judgment for \$10,370 affirmed; injuries to plaintiff, a healthy man of twenty-eight years of age, earning \$3 a day, amputation of leg.

*WILSON v. SOUTHERN PACIFIC Co.*, 13 Utah, 352 (1896), collision between wagon and train at crossing; judgment for plaintiff for \$2,065 affirmed.

*ENGLISH v. SOUTHERN PACIFIC Co.*, 13 Utah, 407 (1896), collision between train and express wagon and person driving latter killed; judgment for plaintiff for \$13,000 (having been reduced from verdict for \$15,000) modified, and judgment ordered for plaintiffs for \$10,000 and costs.

**Accidents to children on track.**

*Child wandering on track run over and killed by train.*

*HYDE v. UNION PACIFIC R'Y Co.*, 7 Utah, 356 (1891), child, between.

four and five years of age, wandering from home and going to sleep on track, run over and killed by train; judgment for plaintiff for \$2,000 affirmed.

*Playing on hand car — Falling off car and run over.*

ROBINSON *v.* OREGON SHORT LINE & UTAH NORTHERN R'Y CO., 7 Utah, 493 (1891), boy, between eleven and twelve years of age, playing on hand car left unguarded on track, falling or jumping from car as it was running down grade, and run over and killed; judgment for plaintiff for \$4,000 reversed, there being no evidence of defendant's negligence.

*Child run over and killed by street car.*

RILEY *v.* SALT LAKE RAPID TRANSIT CO., 10 Utah, 428 (1894), child, seven years old, run over and killed on street-car track by street car, which was going at rapid rate of speed; verdict for \$5,000, but, on appeal, considered excessive, and on reducing same to \$3,000, judgment would be affirmed. It was held "not negligence *per se*, for parents of child, seven years old, to go upon the public streets unattended."

*Child injured by runaway horse.*

IN GRIFFITHS *v.* CLIFT, 4 Utah, 462 (1886), appeal from judgment for plaintiff for \$3,250, rendered in the Third District Court, judgment was affirmed, on the following facts: "The appellant (Clift) in December, 1883, left his horse, attached to his buggy, unhitched in a thickly-populated part of Salt Lake City. The horse ran away and in his flight ran against the plaintiff (Griffiths), a school girl, ten years old, knocked her down and injured her." (Injuries to head, arm, knee and back; *held*, damages not excessive.)

*Collisions between wagons and street cars.*

DEDERICHS *v.* SALT LAKE CITY R. R. CO., 13 Utah, 34 (1896), collision between wagon and electric street car; judgment of nonsuit reversed, it being for the jury to pass upon the evidence and determine the question of negligence.

HALL *v.* OGDEN CITY STREET R'Y CO., 13 Utah, 243 (1896), collision between wagon and street car; judgment of nonsuit reversed.

*Animals on track.*

JOHNSON *v.* RIO GRANDE WESTERN R'Y CO., 7 Utah, 346 (1891), horses on track and one run over and killed by train; judgment for plaintiff for \$150 affirmed.

JEFFS *v.* RIO GRANDE WESTERN R'Y CO., 9 Utah, 374 (1894), cow

being chased by dog running across track and struck by engine running at speed greater than permitted by city ordinance; judgment for plaintiff affirmed.

*STIMPSON v. UNION PACIFIC R'y Co.*, 9 Utah, 123 (1893), horse killed on railway track; judgment for plaintiff for \$132.50 affirmed.

*WINES v. RIO GRANDE WESTERN R'y Co.*, 9 Utah, 228 (1893), horses and mules injured and killed in collision with train; judgment for plaintiff affirmed.

*BUNNELL v. RIO GRANDE WESTERN R'y Co.*, 13 Utah, 314 (1896), cattle crossing track and cow killed by train; judgment for plaintiff reversed, it being held that "the proximate cause of the injury was the turning of the cattle, unattended, upon the highway, between two railroad tracks."

#### COLLISIONS AT CROSSINGS, ACCIDENTS TO CHILDREN AND PERSONS ON TRACKS; VERMONT CASES.

CHILD OF TENDER YEARS RUN OVER ON HIGHWAY — NEGLIGENCE OF PARENTS NOT IMPUTABLE TO CHILD. — In *ROBINSON v. CONE*, 22 Vt. 213 (1850), a leading case on the question of contributory negligence of young children and negligence of parents in permitting them to be on highway unattended, which is directly opposed to the doctrine enunciated in the New York case of *Hartfield v. Roper*, 21 Wend. 615, 12 Am. Neg. Cas. 293, *ante*, the opinion rendered by REDFIELD, J., discussed the English and American cases on the subject, and the points decided are stated in the syllabus to the report as follows:

"In order to sustain an action for the negligence of the defendant, whereby the plaintiff is alleged to have sustained injury, it must appear that the injury did not occur from any want of ordinary care on the part of the plaintiff, either in whole or in part. But all that is to be required of the plaintiff in such case is that he exercise care and prudence equal to his capacity.

"Although a child of tender years may be in the highway, through the fault or negligence of his parents, and so be improperly there, yet if he be injured through the negligence of the defendant, he is not precluded from his redress. If the defendant knows that such a person is in the highway, he is bound to a proportionate degree of watchfulness — to the utmost circumspection — and what would be but ordinary neglect in regard to what he supposed a person of full age and capacity, would be

gross neglect as to a child, or one known to be incapable of escaping danger."

[*Note*.—The case of *ROBINSON v. CONE*, 22 Vt. 213, is somewhat fully referred to in the note to *Hartfield v. Roper*, 21 Wend. 615, 12 Am. Neg. Cas. 293-297, *ante*, that it is not deemed necessary to report the case and opinion in this volume. The doctrine enunciated therein is discussed in the aforesaid note (pages 293-297, *ante*), and the facts of the case are also sufficiently stated therein.]

#### Accidents to children.

In *LINDSAY, ADM'R v. CANADIAN PACIFIC R. R. CO.*, 68 Vt. 556 (1896), child, about two years old, wandering from house onto railroad track and run over and killed by train, judgment on verdict directed for defendant was reversed, the syllabus to the report stating the case as follows:

"1. Evidence that a part of the defendant's railroad yard was used as a common passage way and playground by children, was admissible upon the question whether the defendant's servants exercised proper care in backing their engine over that locality, whereby the intestate, a two-year-old child, was killed.

"2. *Held*, that it was a question of fact for the jury whether the servants of the defendant were guilty of negligence in backing the engine onto intestate, a child two years old, who had escaped from the care of its parents and got upon the track of the defendant without right.

"3. *Held*, further, that it was a question of fact for the jury whether the parents of the intestate were guilty of contributory negligence in suffering the intestate to go upon the track under the circumstances shown."

*MANLEY v. DELAWARE & HUDSON CANAL CO.*, 69 Vt. 101 (1896), child injured in collision with train and wagon at crossing, the carriage in which the child was riding being driven by an aged man and his wife, who were both killed in the collision; judgment for plaintiff affirmed.

#### *Pedestrian struck by wagon while crossing street.*

In *THOMPSON v. NATIONAL EXPRESS CO.*, 66 Vt. 358 (1894), pedestrian crossing street struck by team and wagon, judgment for plaintiff was affirmed, the syllabus stating the case as follows:

"1. Evidence that while the defendant's team was collecting express packages, the driver sprang upon the wagon and started his horse into a trot along the side of a much frequented street near



its junction with another busy street, looking towards the stores on that side, and not observing nor managing his team with reference to the plaintiff, who was thereby struck while crossing the street, tends to show negligence upon the part of the defendant.

"2. The accident occurred near the junction of two of the most frequented streets in the city of Rutland, while the plaintiff was attempting to cross one of those streets. The plaintiff testified that she looked in both directions and neither saw nor heard the team which struck her. *Held*, that the question of contributory negligence was for the jury.

"3. Evidence of pains in other parts of the body than those specified in the declaration as having been injured, is admissible, provided such pains are referred to the injuries received as their cause."

*Climbing over cars at crossing — Contributory negligence.*

IN *MAGOON v. BOSTON & MAINE R. R. CO. ET AL.*, 67 Vt. 177 (1894), person climbing over buffers of freight cars standing at public crossing, judgment for plaintiff was reversed on exceptions to argument of plaintiff's counsel. It was held (as per syllabus to the report), that "one who attempts to pass between freight cars, by climbing over the buffers, is guilty, as matter of law, of contributory negligence, although the cars have been unnecessarily left standing across a public highway for a long time, and although no engine is attached or in sight." \* \* \* "That the defendant failed to blow the whistle, or ring the bell, or give some other warning of its intention to move the cars, did not excuse the plaintiff from due diligence on his own part."

*Horses frightened by noise of train.*

*WAKEFIELD v. CONNECTICUT & PASSUMPSIC RIVERS R. R. CO.*, 37 Vt. 330 (1864), plaintiff's team crossing track and frightened by approaching train, and plaintiff injured by sudden running away of team; horses and wagon also injured by train; judgment for plaintiff reversed; whether omission to sound whistle at crossing as required by statute was negligence, under the circumstances, was for the jury.

*Obstruction near track.*

*BROWNELL v. TROY & BOSTON R. R. CO.*, 55 Vt. 218 (1882), plaintiff's team becoming frightened at approach of train at crossing, running away and into obstruction alongside of track, throwing plaintiff out of wagon, etc.; judgment for plaintiff affirmed.

*Defective crossing.*

MANN *v.* CENTRAL VERMONT R. R. CO., 55 Vt. 484 (1893), plaintiff's horse injured while being driven over defective crossing; judgment for plaintiff affirmed.

*Animals on track.*

See JACKSON *v.* RUTLAND & BURLINGTON R. R. CO., 25 Vt. 150; BEMIS *v.* CONN. & PASS. R. R. CO., 42 Vt. 375; TROW *v.* VERMONT CENTRAL R. R. CO., 24 Vt. 487; MORSE *v.* RUTLAND & BURLINGTON R. R. CO., 27 Vt. 49; QUIMBY *v.* VERMONT CENTRAL R. R. CO., 23 Vt. 387; LYNDSEY *v.* CONN. & PASS. R. R. CO., 27 Vt. 643; HOLDEN *v.* RUTLAND & BURLINGTON R. R. CO., 30 Vt. 297; COOLEY *v.* BRAINERD, 38 Vt. 394; MEAD *v.* BURLINGTON & LAMOILLE R. R. CO., 52 Vt. 278; CONGDON *v.* CENTRAL VERMONT R. R. CO., 56 Vt. 390; ST. JOHNSBURY & LAKE CHAMPLAIN R. R. CO. *v.* HUNT, 59 Vt. 294; WAIT *v.* BENNINGTON & RUTLAND R. R. CO., 61 Vt. 268; SMITH *v.* BARRE R. R. CO., 64 Vt. 21; HARWOOD *v.* BENNINGTON & RUTLAND R'y CO., 67 Vt. 664.

*Mutual negligence.*

IN TROW *v.* VERMONT CENTRAL R. R. CO., 24 Vt. 487 (1852), horse killed on railroad track, the rule as to mutual negligence is fully stated in the opinion rendered by ISHAM, J.: "When there has been mutual negligence on the part of the plaintiff and defendant, and the negligence of each was the proximate cause of the injury, no action can be sustained. So where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting in some other matter than what occurred at the time of the injury, no action can be sustained. But where the negligence of the defendant is proximate, and that of the plaintiff remote, the action for the injury can well be sustained, though the plaintiff were not entirely without fault; so that, if there were negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant by the exercise of reasonable care and prudence, an action will lie for the injury."

VIRGINIA CASES RELATING TO COLLISIONS AT CROSSINGS AND ACCIDENTS TO PERSONS ON STEAM AND STREET RAILROAD TRACKS.

CHILD OF TENDER YEARS RUN OVER BY TRAIN — NEGLIGENCE OF PARENTS NOT IMPUTABLE TO CHILD. — IN NORFOLK & PETERSBURG R. R. CO. *v.* ORMSBY, 27 Gratt. (Va.) 455 (1876), infant of about three years of age running out of house onto railroad track and run over by train, his arm being

crushed necessitating its amputation, judgment for \$8,000 was affirmed. The syllabus to the report sufficiently states the case as follows:

"1. The terms negligence and ordinary care are correlative terms. Ordinary care depends on the circumstances of the particular case, and is such care as a person of ordinary prudence under the circumstances would have exercised.

"2. A railroad company running its cars through a populous street of a city, on which many children live, must omit nothing which can be done by the company and its agents to prevent injury to children on the street.

"3. A child two years and ten months old cannot be capable of contributory negligence, so as to relieve a railroad company from liability for its own negligence.

"4. Negligence of the parent or guardian of an infant child injured by a railroad car cannot constitute contributory negligence on the part of the child, so as to exonerate the company. *Lynch v. Nurdin*, 41 Eng. C. L. 422, *approved*; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615 (12 Am. Neg. Cas. 293, *ante*), *disapproved*.

"5. In an action for injuries involving the loss of an arm, plaintiff may introduce evidence to show what must be the effect of his injuries in disqualifying him from pursuits requiring two hands."

*Boy driving across track at crossing — Contributory negligence.*

In *NORFOLK & WESTERN R. R. CO. v. STONE'S ADM'R*, 88 Va. 310 (1891), where "boy of thirteen years, acquainted with a railroad crossing at which, by reason of a deep cut, a train was not visible until one was on the track, though just informed at the post office that the train was late and might reach the crossing about when he did, yet drives upon the crossing with his ears wrapped up in a comfort on account of the cold: *Held*, guilty of such contributory negligence as barred the recovery of damages for his death, though the train was running more rapidly than usual and no signal was given of its approach." Judgment for plaintiff for \$8,000 reversed.

*Boy attending to stock and going to sleep on track injured by train — Railroad company not liable.*

*RUDD'S ADM'R v. RICHMOND & DANVILLE R. R. CO.*, 80 Va. 546 (1885), boy of twelve years of age sent by parents to mind cows in field along railway, going to sleep on track and run over and killed by freight train; defendant's demurrer to evidence sustained, it being held that evidence was insufficient to sustain verdict for \$4,750 rendered for plaintiff; judgment for defendant on demurrer affirmed.

NORFOLK & WESTERN R. R. CO. *v.* DUNNAWAY'S ADM'R, 93 Va. 29 (1896), boy eleven years old attending to cow pasturing in field near railroad track, going on track and lying down and falling asleep there, run over and killed by train; trespasser; judgment for plaintiff reversed and judgment rendered for defendant.

*Child running in front of street car — Railway company not liable.*

TRUMBO'S ADM'R *v.* CITY STREET CAR CO., 89 Va. 780 (1893), child about six years of age running on track in front of street car and run over and killed; verdict for plaintiff for \$1,222.85 set aside on first trial; on second trial there was verdict for defendant, which on appeal was affirmed, there being no evidence of negligence on defendant's part.

**Persons walking along track or at crossings.**

*Walking on track — Contributory negligence.*

IN BALTIMORE & OHIO R. R. CO. *v.* SHERMAN'S ADM'X, 30 Gratt. (Va.) 602 (1878), person walking on track killed by train, judgment for plaintiff for \$3,000 was reversed, the third paragraph of the syllabus to the report sufficiently stating the case as follows: "In an action on the case by the administrator of a person killed upon a railroad track against the company, the deceased not being an employee of the company or a passenger, but walking on it for his own convenience, but not of necessity, it was *held* in this case, upon the evidence, that there was little ground to charge negligence upon the company; but if there was negligence on the part of the company, there was contributory negligence on the part of the deceased; and certainly the negligence of the company, if any, was not so gross as, notwithstanding the contributory negligence of the deceased, to render the company responsible for the damages sustained by the plaintiff from the killing of the deceased."

*Run over on railroad trestle — Contributory negligence.*

VIRGINIA MIDLAND R. R. CO. *v.* BARKSDALE'S ADM'R, 82 Va. 330 (1886), person walking on railroad trestle run over and killed by train; judgment for plaintiff for \$2,000 reversed; contributory negligence.

*Person killed on track — Railroad company not liable.*

FARLEY'S ADM'R *v.* RICHMOND & DANVILLE R. R. CO., 81 Va. 783 (1886), plaintiff's intestate killed on track; engineer of train on discovering person on track did all that was possible to avert collision; defendant's demurrer to plaintiff's evidence sustained, evidence not sufficient to justify verdict for plaintiff for \$10,000 and judgment for defendant on demurrer affirmed.

*Walking along track in railroad yard — Contributory negligence.*

NORFOLK & WESTERN R. R. Co. *v.* HARMAN'S ADM'R, 83 Va. 553 (1887), plaintiff's intestate walking along track within limits of railroad yard run over by tender attached to engine which was being backed to coal wharf; judgment for plaintiff for \$2,700 reversed on ground of gross negligence of deceased; judgment rendered for defendant on demurrer.

*Walking on track in railroad yard — Railroad company liable.*

VIRGINIA MIDLAND R. R. Co. *v.* WHITE'S ADM'R, 84 Va. 498 (1888), person walking on track run over by yard engine in defendant's yard; trespasser; gross negligence of railroad company; failure to signal; judgment for plaintiff for \$5,000 affirmed.

*Deaf mute walking on track — Contributory negligence.*

TYLER (RECEIVER OF SHENANDOAH VALLEY R. R. Co.) *v.* SITE'S ADM'R, 88 Va. 470 (1891), deaf mute walking on railroad track struck by engine; train visible for nearly a mile; no whistle blown; *held*, that his own negligence contributed to his death, and judgment for plaintiff reversed.

On a subsequent appeal in TYLER *v.* SITE'S ADM'R, 90 Va. 539 (1894), judgment for plaintiff for \$1,500 was reversed on ground of contributory negligence.

*Killed while crossing track — Contributory negligence.*

NORFOLK & WESTERN R. R. Co. *v.* CARPER'S ADM'R, 88 Va. 556 (1892), plaintiff's intestate killed by train while crossing track; judgment for plaintiff for \$2,000 reversed on ground of contributory negligence.

*Crossing track in front of train — Contributory negligence.*

MARK'S ADM'R *v.* PETERSBURG R. R. Co., 88 Va. 1 (1891), plaintiff's intestate, a one-eyed woman, fifty-three years of age, crossing track within few feet of slowly-backing freight train, run over and killed; contributory negligence; judgment for defendant affirmed.

See also HOGAN'S ADM'R *v.* TYLER (RECEIVER OF SHENANDOAH VALLEY R. R. Co.), 90 Va. 19 (1893), where judgment for defendant was affirmed on authority of Marks *v.* Petersburg R. R. Co., 88 Va. 1 (preceding paragraph), it being held that "where a person, after standing near a railroad crossing, attempts to cross and is run over by a train which he might see or hear if he looks or listens, he is guilty of such contributory negligence as will prevent a recovery for his death, notwithstanding negligence of defendant in failing to sound the whistle or ring the bell."

*Struck by freight train while crossing track — Contributory negligence.*

NORFOLK & WESTERN R. R. Co. *v.* WILSON, 90 Va. 263 (1893), person crossing track struck by freight train; failure to look for trains on track on which he was walking; contributory negligence; judgment for plaintiff for \$680 reversed.

JOHNSON'S ADM'R *v.* CHESAPEAKE & OHIO R. R. Co., 91 Va. 171 (1895), plaintiff's intestate killed by freight train at crossing; judgment for defendant on demurrer to evidence affirmed.

**Persons lying down on railroad track.**

RICHMOND & DANVILLE R. R. Co. *v.* ANDERSON'S ADM'R, 31 Gratt. (Va.) 812 (1879), person walking along track killed by train; contributory negligence; judgment for plaintiff for \$6,000 reversed; (it appeared that deceased was lying on the track at the time of the accident).

VIRGINIA MIDLAND R. R. Co. *v.* BOSWELL'S ADM'R, 82 Va. 932 (1887), plaintiff's intestate lying asleep on track run over and killed by train; judgment for plaintiff for \$5,000 reversed, defendant not being liable, negligence on its part not being shown.

SEABOARD & ROANOKE R. R. Co. *v.* JOYNER'S ADM'R, 92 Va. 354 (1895), person sitting down on railroad track run over and killed by train, he being within view from time the train left station until it struck deceased; trespasser; gross negligence of defendant's servants; judgment for plaintiff affirmed.

TUCKER'S ADM'R *v.* NORFOLK & WESTERN R. R. Co., 92 Va. 549 (1896), person lying on track struck and fatally injured by engine; trespasser; judgment for defendant on demurrer to evidence affirmed.

**Collisions between wagons and trains at crossings.**

NASH *v.* RICHMOND, FREDERICKSBURG & POTOMAC R. R. Co., 82 Va. 55 (1886), collision between wagon and train at crossing; failure of plaintiff to look for approaching train; contributory negligence; judgment for defendant affirmed.

See also NEW YORK, PHILADELPHIA & NORFOLK R. R. Co. *v.* KELLAM'S ADM'R, 83 Va. 851 (1887), collision between vehicle and train at crossing; judgment for plaintiff for \$2,500 reversed on ground of contributory negligence of deceased.

In RICHMOND & DANVILLE R. R. Co. *v.* YEAMANS, 86 Va. 860 (1890), collision between wagon and train, judgment for plaintiff for \$9,000 was reversed. The syllabus to the report (paragraph 5) states the facts as follows: "Where a plaintiff acquainted with a crossing, and aware that the place was used for shifting cars, was seen by engineer of the shifter, that had just passed, to drive his

one-horse wagon safely across the track within a few feet of the shifter, the horse not noticing it, and to proceed some nine feet from the track, when, the engineer not observing, the horse balked and backed the wagon onto the track into collision with the shifter, which, having coupled onto a train of cars, was backing down the track, whereby injury resulted to wagon, horse and plaintiff: *Held*, error to refuse to set aside the verdict for the plaintiff as not warranted by the evidence."

See also subsequent decision in the YEAMANS case, 90 Va. 752 (1894), where it was held defendant was not liable and judgment for plaintiff reversed.

*Horse frightened by noise of train.*

PETERSBURG R. R. CO. v. HITE, 81 Va. 767 (1886), plaintiff's horse, which he was driving along public street, frightened by noise of steam from engine, running away and plaintiff injured; judgment for plaintiff for \$900 affirmed.

*Run over by mule.*

In BOWEN v. FLANAGAN, 84 Va. 313 (1888), it appeared that "plaintiff, on a railroad velocipede, was proceeding along the track towards its intersection with a street, when he saw a mule and cart standing in the street near the track. He reduced his speed to two miles an hour. When he reached the street, the mule, which was unattended by defendant's servant, having charge thereof, which fact plaintiff did not perceive, ran over and injured plaintiff. *Held*, that defendant was liable in damages." Judgment for plaintiff affirmed.

*Run over by horse and vehicle.*

MUSE v. STERN, 82 Va. 33 (1886), trespass on the case, to recover damages for negligent management of defendant's horse and phaeton, whereby plaintiff was injured; two trials below in one of which verdict for plaintiff was set aside, and in the other verdict was for defendant; plaintiff excepted to results of both trials; judgment for defendant affirmed. (It appeared that Straus and Stern were partners. The former owned a horse and phaeton and sent his servant with same to meet Stern. While driving the injury to Muse happened. It was held that relation of master and servant did not exist between defendant Stern and driver, and plaintiff could not recover against defendant; also, that Stern's mere presence at time of injury did not make him liable for driver's negligence.)

*Animals on track.*

See *TROUT v. VIRGINIA & TENNESSEE R. R. Co.*, 23 Gratt. (Va.) 619; *ORANGE, ALEXANDRIA & MANASSAS R. R. Co. v. MILES*, 76 Va. 773; *RICHMOND & DANVILLE R. R. Co. v. NOELL*, 86 Va. 19; *NORFOLK & WESTERN R. R. Co. v. MCGAVOCK*, 90 Va. 507; *NORFOLK & WESTERN R. R. Co. v. JOHNSON*, 91 Va. 661.

NOTES OF WASHINGTON CASES RELATING TO COLLISIONS AT CROSSINGS AND ACCIDENTS TO PERSONS ON TRACK.

*Collision between wagon and train at crossing.*

*LADOUCEUR v. NORTHERN PACIFIC R. R. Co.*, 4 Wash. 38 (1892), collision between wagon and train at crossing; judgment for defendant reversed, it being error to nonsuit on ground of contributory negligence for failure to stop, look and listen, when if plaintiff had done so he could not have seen or heard the train.

See subsequent decision in the *LADOUCEUR* case, 6 Wash. 280 (1893), where judgment for plaintiff was affirmed.

*Collision between wagon and street car.*

*SPURRIER v. FRONT STREET CABLE R'Y Co.*, 3 Wash. 659 (1892), collision between wagon and street car; judgment for plaintiff for \$1,000 affirmed.

*CHRISTENSEN v. UNION TRUNK LINE*, 6 Wash. 75 (1893), collision between wagon and street car; contributory negligence in attempting to cross track in front of car; judgment for plaintiff reversed.

*REDFORD v. SPOKANE STREET R'Y Co.*, 9 Wash. 55 (1894), collision between wagon and street car; judgment for plaintiff reversed for erroneous instructions, etc.

See subsequent decision in the *REDFORD* case, 15 Wash. 419 (1896), in which judgment for plaintiff was affirmed.

*Person crossing track—Defective crossing.*

*LEWIS v. PUGET SOUND SHORE R. R. Co.*, 4 Wash. 188 (1892), person walking on loose boards on railroad ties alongside track, attempting to cross track when engine was close upon him, slipping and falling under wheels of car and fatally injured; judgment reversed on ground of contributory negligence.

*Child crossing street struck by cable car.*

*MITCHELL v. TACOMA RAILWAY & MOTOR Co.*, 9 Wash. 120 (1894), girl, a little over eight years old, while crossing street, knocked down by cable car; judgment for plaintiff for \$12,000 reversed for erroneous instructions.



See *MITCHELL v. TACOMA R'Y & MOTOR CO.*, 13 Wash. 560 (1896), where judgment for plaintiff was affirmed, on condition that plaintiff remit \$18,000 from verdict rendered for \$30,000, in which case judgment for \$12,000 would be affirmed.

*Kicking cars — Run over by car.*

*ROTH v. UNION DEPOT CO.*, 13 Wash. 525 (1896), boy nine years old, walking along footpath habitually used by public on defendant's right of way, knocked down by a car "kicked" down grade; judgment for plaintiff for \$15,000 affirmed (injuries, loss of one of his legs).

*Child playing on turntable.*

*ILWACO RAILWAY & NAVIGATION CO. v. HEDRICK*, 1 Wash. 446 (1890), child, between five and six years of age playing on turntable, sustaining fatal injuries; judgment for plaintiff for \$2,000 affirmed.

*Animals on track.*

See *OREGON RAILWAY & NAVIGATION CO. v. SMALLEY*, 1 Wash. 206 (1890); *OREGON RAILWAY & NAVIGATION CO. v. DACRES*, 1 Wash. 195 (1890), following ruling in *DACRES v. OREGON RAILWAY & NAVIGATION CO.*, 1 Wash. 525 (1889), on "railway fence" law (Washington Laws 1883); *JOLLIFFE v. BROWN ET AL. (RECEIVERS)*, 14 Wash. 155 (1896).

NOTES OF WEST VIRGINIA CASES RELATING TO COLLISIONS AT CROSSINGS AND ACCIDENTS ON TRACK.

**COLLISION BETWEEN WAGON AND TRAIN AT CROSSING — HORSE FRIGHTENED — DUTIES OF TRAVELERS AND RAILROAD COMPANIES AT CROSSINGS.** — In *BEYEL v. NEWPORT NEWS & MISSISSIPPI VALLEY R. R. CO.*, 34 W. Va. 538 (1890), collision between wagon and train at crossing whereby horse became frightened, ran away and overturned wagon, causing injuries to plaintiff, judgment for plaintiff for \$1,876 was reversed for erroneous exclusion of instructions asked by defendant. The syllabus states the case as follows:

"1. Failure to ring a bell or blow a whistle on an engine, as required by the Code, ch. 54, § 61, is negligence for which a railroad company is chargeable; but this does not excuse a traveler on a highway crossing a railroad track from the exercise of such reasonable care and caution as the law requires, to ascertain whether a train is approaching the crossing.

"2. The traveler and the company have mutual and reciprocal duties and obligations in such case, and, though a train has the right

of way, the same degree of care and diligence to avoid collision is due from both.

"3. It is the duty of a traveler on the highway crossing a railroad to look carefully for an approaching train, and if looking leaves any doubt, or the view is obstructed, he must also listen, before attempting to cross; otherwise he will himself be guilty of negligence, which will prevent his recovery for an injury received in crossing. Obstructions rendering the view obscure and unreliable call for greater caution on his part."

[The BEVEL case, *supra*, may be regarded as a leading case on the reciprocal duties of travelers and railroad companies.]

*Collision between wagon and train at crossing.*

BUTCHER *v.* WEST VIRGINIA & PITTSBURGH R. R. CO., 37 W. Va. 180 (1892), collision between wagon and train at crossing; judgment for plaintiff for \$2,000 reversed; burden on plaintiff not only to show failure of railroad company to give statutory signal, but also that such failure was proximate cause of injury.

*Person killed by train while crossing track.*

In NUZUM *v.* PITTSBURGH, CINCINNATI & ST. LOUIS R'Y CO., 30 W. Va. 228 (1887), person crossing track at much frequented pathway from steamboat landing to railroad track, struck and killed by train moving by its own momentum at speed exceeding rate fixed by city ordinance, judgment directing verdict for defendant was reversed for erroneous exclusion of evidence offered by plaintiff. It was *held* that if the servants of a railroad company, having in its charge one of its engines and trains running within the corporate limits of a city in this State, to and over a public wharf therein, shall fail or neglect to give notice at least sixty rods before its approach to such wharf by ringing the bell or blowing the whistle of the locomotive for a sufficient time to give notice of its approach thereto, such failure or neglect is of itself negligence on the part of such railroad company." *Held*, also, that "the fact that pedestrians are accustomed to travel on a railroad at a particular place, makes it the duty of such railroad company to exercise greater caution and prudence in the operation of its road at that place." *Held*, also, that "if such company permit a train of its cars to be moved at that place, without having some of its servants in position to give warning of its approach, and to control its movements, these facts are of themselves acts of negligence."

*Person killed while walking on track — Contributory negligence.*

RAINES *v.* CHESAPEAKE & OHIO R'Y CO., 39 W. Va. 50 (1894), person walking slowly on railroad track with back towards train,

reading a paper, struck and killed by train; contributory negligence; judgment for defendant affirmed; on rehearing, facts again reviewed and judgment for defendant.

PERSON STRUCK BY ENGINE AT STREET CROSSING — DUTY OF TRAVELER AT CROSSING. — In *BERKELEY v. CHESAPEAKE & OHIO R'Y CO.*, 43 W. Va. 11 (1896), person crossing track struck by switch engine at street crossing, judgment for plaintiff for \$2,000 was reversed, and judgment rendered for defendant upon demurrer to the evidence. The syllabus states the case as follows:

"1. Where a party with no defect in his sight or hearing attempts to cross a railway track at a street crossing in a city, without looking or listening for the approach of a train, and is struck and injured by a train moving on said railroad, his negligence is such as to preclude him from recovering damages for such injury, although the servants of the railroad may have been negligent in failing to ring a bell or blow a whistle before reaching said crossing, as required by statute (Code, ch. 54, § 61).

"2. The person thus attempting to cross the railroad track, and the company owning the railroad, have mutual and reciprocal duties and obligations in such case; and, though a train has the right of way, the same degree of care and diligence to avoid collision is due from both.

"3. It is the duty of the pedestrian at the street crossing of a railway to look carefully for an approaching train, and, if the view is obstructed, to listen before attempting to cross the track; otherwise he will himself be guilty of negligence which will prevent his recovery for an injury received in crossing." (Following the rule in *BEVEL v. NEWPORT NEWS & MISSISSIPPI VALLEY R. R. CO.*, 34 W. Va. 538, a leading case on the subject in West Virginia. See the *BEVEL* case in this volume, page 638, *ante*.)

*Child run over and killed by train — Negligence of parents not imputable to child.*

In *GUNN v. OHIO RIVER R. R. CO.*, 42 W. Va. 676 (1896), child about six years old run over and killed by train, judgment for defendant was reversed and judgment for plaintiff on demurrer to evidence. It was *held* that "a child of very tender years is not chargeable with contributory negligence." *Held*, also, that "while it may be assumed by the engineer that a person walking upon a railroad track will get off it in time to save himself from injury from a train, yet that is not the rule as to children of very tender years,

or persons plainly and obviously disabled by deafness, intoxication, sleep, or other causes from taking care of themselves."

*Animals injured or killed on track.*

See *HAWKER v. BALTIMORE & OHIO R. R. CO.*, 15 W. Va. 628; *BAYLOR v. BALTIMORE & OHIO R. R. CO.*, 9 W. Va. 270; *BLAINE v. BALTIMORE & OHIO R. R. CO.*, 9 W. Va. 252; *WASHINGTON v. BALTIMORE & OHIO R. R. CO.*, 17 W. Va. 190; *JOHNSON v. BALTIMORE & OHIO R. R. CO.*, 25 W. Va. 570; *LAYNE v. OHIO RIVER R. R. CO.*, 35 W. Va. 438; *HOGUE v. OHIO RIVER R. R. CO.*, 35 W. Va. 562; *CLARK v. OHIO RIVER R. R. CO.*, 34 W. Va. 200, also 39 W. Va. 733; *COYLE v. BALTIMORE & OHIO R. R. CO.*, 11 W. Va. 94; *HEARD v. CHESAPEAKE & OHIO R'Y CO.*, 26 W. Va. 455; *BULLINGTON v. NEWPORT NEWS & MISSISSIPPI VALLEY CO.*, 32 W. Va. 436; *TOUDY v. NORFOLK & WESTERN R. R. CO.*, 38 W. Va. 694; *MAYNARD v. NORFOLK & WESTERN R. R. CO.*, 40 W. Va. 331; *LOVEJOY v. CHESAPEAKE & OHIO R'Y CO.*, 41 W. Va. 693; *KIRK v. NORFOLK & WESTERN R. R. CO.*, 41 W. Va. 722; *TALBOT v. WEST VIRGINIA, C. & P. R'Y CO.*, 42 W. Va. 560.

## LOCKWOOD v. BELLE CITY STREET-RAILWAY COMPANY.

*Supreme Court, Wisconsin, January Term, 1896.*

[Reported in 92 Wis. 97.]

**COLLISION BETWEEN WAGON AND STREET CAR — PERSON RIDING IN WAGON INJURED — FAILURE TO LOOK AND LISTEN — CONTRIBUTORY NEGLIGENCE — NEGLIGENCE OF DRIVER —**  
Where plaintiff was injured by reason of a collision of the wagon in which he was riding with defendant's electric street car, and it appeared that the street car was coming from an easterly direction and the wagon was being driven across the track towards the northwest, plaintiff being in the rear of the wagon to attend to a safe which was in the wagon, and having his back to the east, it was *held* that the fact that plaintiff neither saw nor heard the coming car was conclusive that he neither looked nor listened for it, and he was guilty of contributory negligence (1).

It was also *held*, that the driver of the wagon was negligent, and that the motorman of street car was not guilty of gross negligence or of negligence more culpable than that of the plaintiff or his father, who was driving the horse.

1. See note on the rule of "Stop, sign case (decided in 1901), viz., *BROWN Look and Listen*," in 9 AM. NEG. REP. *v. CHICAGO & N. W. R'Y CO.*, 9 Am. 408-416, appended to a recent Wisconsin Neg. Rep. 403.

**MUTUAL NEGLIGENCE.** — Where by the conduct of both parties in the transaction they are guilty of negligence in the same degree or are equally culpable, there can be no recovery (1).

**DEGREES OF NEGLIGENCE.** — The degrees of negligence, *slight, ordinary* and *gross*, reviewed, reiterated and re-affirmed in the opinion of CASSODAY, CH. J. (2)

APPEAL from a judgment of the Circuit Court for Racine County, entered for defendant upon the special verdict rendered by the jury. The facts appear in the opinion. *Judgment affirmed.*

WALLACE INGALLS (JOHN B. SIMMONS, of counsel), for appellant.

THOMAS M. KEARNEY, for respondent.

Cassoday, Ch. J. — 1. Main street, in Racine, runs in a northerly and southerly direction. State street starts at Main street and runs westerly therefrom. The defendant has double street-car tracks on Main street, southerly from the east end of State street, and also has double street-car tracks connecting with those on Main street, and curving from Main street onto State street, and running thereon westerly, far beyond the place of the accident, and upon and over which the defendant's electric street cars run east and west at short intervals. State street at the place in question is seventy-four feet in width, the sidewalks occupying twelve feet on either side, leaving fifty feet between the sidewalks; and about the middle of that space is occupied by double street-car tracks, each being five feet wide, with a space of four feet between the two tracks. Between the curb line on either side and the railway track is a little less than seventeen feet. The cars going west run upon the north track, and the cars going east run upon the south track. There is an alley running southerly from State street, the middle of which is 120 feet west of the building front on Main street, but the alley is not continued on the north side of State street. The alley is about sixteen feet wide. From the end of the alley to the north rail of the north track is forty-three feet. About 129 feet west of the alley is a

1. A recent Wisconsin case, *TESCH v. MILWAUKEE ELECTRIC RY & LIGHT CO.*, (decided in January, 1901), and reported in 9 AM. NEG. REP. 388-402, states the rule as to negligence and the duties of travelers and railway companies at crossings, the opinion being rendered by MARSHALL, J.

2. The Wisconsin cases cited in the opinion in the case at bar are made the subject of a note to the report of the case in this volume, *post*.

viaduct, and the grade from Main street to the viaduct ascends about four feet. On the north side of State street the viaduct is about 276 feet west of the west curb line of Main street. From a point opposite the alley in the center of the north track to the straight track on Main street, the distance is 160 feet; and by following on the curve of the track onto State street it is 170 feet.

It appears from the facts as stated by the plaintiff's counsel and his witnesses, in effect, that the vehicle was a three-spring delivery wagon; that the box was eleven feet and eleven inches long; that the thills were seven feet long; that it was nineteen feet and three inches from the ends of the shafts to the rear end of the box; that it was drawn by a single horse; that about half-past four o'clock in the afternoon of the day named, at a point in the alley some distance south of State street, an iron safe was placed in the wagon a little in front of the hind wheels; that the plaintiff got onto the wagon to hold the safe in place; that the plaintiff's father occupied the east end of the seat, as they moved north; that the plaintiff's uncle occupied the west end of the seat; that while in these relative positions, the father drove north in the alley to State street; that their object was to take the safe to the father's house on the west side of the river, and for that purpose it was necessary to go west on State street; that when they first came out of the alley the father looked east, but saw no car; that there was a horse and wagon standing in front of an office on the opposite side of the street and immediately west of the line of the alley if the same had been projected north; that from the end of the alley, the horse was driven in a northeasterly direction; that when the father first saw a car coming to the corner on Main street, the forefeet of the horse were then over the south rail of the south track; that when the wagon was on the north track, going west, the uncle told the father there was a car coming, and to hurry up, and the father then saw it coming about 100 feet east of them; that he tried to get out of the way as much as he could, by turning as far as he could to the right, but the hind wheel on the left-hand side slipped along on the north rail of the north track; that by reason of the length of the wagon and the obstructions north of the north track and the wheel slipping along the rail, the wagon could not be got out of the way sooner, and so the car ran into the hind end of the wagon, and threw the safe and the plaintiff out, and injured his thumb so that amputation became necessary; that the place of the collision

was about fifty feet east of the bridge or viaduct. That would be, according to the evidence, about eighty feet west of the line of the alley projected, or something more than 100 feet from the north end of the alley. It is conceded that from the time they left the alley until the collision, the plaintiff did not hear nor see the car; that during that time he had hold of the safe, with his back towards the east.

The findings of the jury, to the effect that the plaintiff and the driver were each guilty of a want of ordinary care, are certainly sustained by the evidence. The fact that the plaintiff neither saw nor heard the coming car, and that his back was all the time turned towards the east, is conclusive that he neither looked nor listened for the coming car; and that certainly constituted negligence on his part — especially as he must have known, during all the time of the danger, that the faces of his father and uncle were towards the northwest, so that they could not see a car coming from the east without inconvenience. The fact that the plaintiff's father, driving the horse, saw the coming car when the horse's forefeet were on the south track, and saw that the portion of the street north of the north track, in the direction in which he was driving, was obstructed by a horse and wagon standing in front of the office mentioned, ought to have admonished him that there was danger of his obstructing the passage of the coming car, as well as endangering his own safety, if he persisted in driving in the direction of the obstruction, instead of turning and going west, south of all the tracks. Besides, it appears, not only from his testimony, but also from the testimony of his brother, who was on the seat with him, that he did not see the car at all until his brother told him to hurry up, as there was a car coming around the corner; and when the brother saw the car coming and not slowing up he again told the driver, and he again urged the horse up; and that when the car approached nearer, the uncle waved his hand twice at the motorman to stop. The driver's negligence is apparent.

2. The plaintiff called, as a witness, the motorman on the car in question, at the time of the collision, and he testified to the effect that he had been such motorman on the defendant's cars about six months; that prior to that time he had been a conductor thereon; that he came slowly around the curve, about as fast as a man would naturally walk; that on leaving the curve, he applied the power to gradually increase the speed, in the customary

way, and went to putting on his gloves; that when he got about 100 feet from the wagon he, for the first time, discovered the horse and wagon going northwesterly across the tracks; that when he first saw them, the horse was on the north track, and the wagon on the south track and between the tracks; that, running at the speed he was, he supposed they would get out of the way; that when he got forty or fifty feet from them he saw they were not yet clear from the track, "that there was a possibility of" the wagon "not clearing the track," and so he "proposed to stop the car;" that the first thing generally done when there is danger ahead is to pull off the current; that he threw off the current; that that was the first move in all cases; that the first thing he did to stop the car was to use the brake; that when he applied the brake, he tightened up on the lever; that for some reason the lever slipped from his hand, or slipped in the ratchet, or slipped somewhere, and the lever came with the weight of the chain and brakes, and struck him in the side; that the brake gave way; that he thought the ratchet gave way; that he could not tell positively why it gave way — whether it was the fault of the dog, fastened onto the dash, or whether it was a slip — but he knew it gave way; that as soon as the brake slipped and struck him, he realized that he had not time enough to again apply the brake before a collision, and so he tried to apply the reverse current; that in order to do so, he had to take hold of the lever and the spring on the top of the cylinder, and shove around to the right; that he hit it three or four times, but that it would not turn by the point; that it seemed to strike some way, but when he had hit it three or four times, and just as the car struck the wagon, it slid along, and the current took effect and reversed all right, and the car started back; that had the reverse current taken effect when first applied, or an instant sooner than it did, the car would not have hit the wagon at all; that the instructions were not to use the reverse current, unless necessary to prevent accident, as the use of the reverse current was likely to break or injure the car. Such evidence of the motorman is undisputed.

It is undisputed that, under ordinary circumstances, an electric car running at the rate of seven or eight miles an hour, can be stopped by the application of the brake in going a distance of thirty-five or forty feet; and that running at the rate of six or seven, or even ten, miles an hour it can be stopped by the reverse current, properly applied, in going a distance of eight or ten feet.



The jury found that while passing between Main street and the place of the accident, the car was moving at the rate of about six miles per hour; and that the horse and wagon were moving more than half as fast.

Thus it appears, and is undisputed, that the motorman saw the horse and wagon when 100 feet distant from them; that when he got within forty or fifty feet of them, he was active in doing all that he could in trying to stop the car — in throwing off the current, in attempting to apply the brake, and in attempting to apply the reverse current; and that he failed because, and only because, the brake gave way, as indicated, and the reverse current, for the moment, failed to take effect, as indicated. There is not a particle of evidence that the giving way of the brake or the failure of the reverse current to take effect was the fault of the motorman. The jury must have concluded that the motorman had reasonable ground for apprehending danger of a collision, when his car was more than forty or fifty feet from the wagon; and yet the evidence is undisputed that had the brake worked as usual, or the reverse current had taken effect as usual, the motorman would have had no difficulty in stopping the car, at the speed it was going, in moving a distance of thirty or forty feet. Thus it is manifest from the undisputed evidence that there was no failure of the motorman to keep a proper lookout, no failure to act when there was reasonable ground for apprehending danger, no wilful or intentional wrong or omission of duty. If he was at fault at all, it must have been some unconscious misjudgment, mistake or mismeove in manipulating the brake or in applying the reverse current, not disclosed by the evidence. Such misjudgment, mismeove or mistake (assuming it to have been made) was certainly not more culpable than, if as culpable as, the negligence of the plaintiff or his father, who was driving the horse.

That there can be no recovery, under such circumstances, has been held by this court in cases too numerous to mention. Perhaps the case of *Schilling v. Chicago, M. & St. P. R. R. Co.*, 71 Wis. 255, illustrates the question involved as well as any. In that case the plaintiff's intestate might, had he looked, have seen the train coming when nearly half a mile distant, as the track was straight and there was no obstruction. When the train got within eighty rods of him he was seen by the engineer, walking along a pathway outside of the track, and about three feet from it, in the same direction the train was going. When the train

got within forty feet of him, he turned onto the track and was struck by the engine and was killed. The evidence tended to prove that the train was due about that time; that it was running at an unlawful rate of speed; that the bell was not rung, nor the whistle blown, nor any signal given; that about the time the engineer first saw the deceased, he had occasion to look down where he could not see the track in front, while adjusting certain machinery, and so did not look ahead on the track again until the engine was within about forty feet of the deceased; that during the same time, the fireman was busy putting in coal, as it was necessary and his duty to do. The trial court granted a nonsuit, and this court affirmed the judgment. Mr. Justice TAYLOR dissented on the ground that, admitting that the negligence of the deceased contributed to the injury, yet there was evidence tending to prove "gross carelessness" in the engineer's not watching the deceased, after he first saw him, and stopping the train before striking him; that the failure to do so was "reckless or intentional negligence." But the decision of the court was necessarily to the effect that the conduct of the engineer, in assuming that the deceased, so walking on the pathway near the track, would not, under the circumstances, when the train got within forty feet of him, step upon the track in front of the engine, was not reckless nor wanton, and much less intentional. In other words, it was in effect held that where by the conduct of both parties, in the transaction, they are guilty of negligence in the same degree, or are equally culpable, there can be no recovery. The principle upon which that case was decided has been sanctioned by numerous cases since, as well as before: *Williams v. Chicago, M. & St. P. R. Co.*, 64 Wis. 1; *Seefeld v. Chicago, M. & St. P. R. Co.*, 70 Wis. 216; *Hansen v. Chicago, M. & St. P. R. Co.*, 83 Wis. 631; *Schmolze v. Chicago, M. & St. P. R. Co.*, 83 Wis. 659; *Wilber v. Wisconsin Central R. Co.*, 86 Wis. 535; *Haetsch v. Chicago & N. W. R'y Co.*, 87 Wis. 304; *Lofdahl v. M., St. P. & S. S. M. R. Co.*, 88 Wis. 421; *Schlimgen v. Chicago, M. & St. P. R. Co.*, 90 Wis. 194; *Nolan v. M., L. S. & W. R. Co.*, 91 Wis. 16, 26.

But it is vigorously urged that the case at bar comes squarely within the ruling of this court in *Valin v. M. & N. R. Co.*, 82 Wis. 1. The two cases are, however, broadly distinguishable. In that case the question was whether the verdict was properly directed in favor of the defendant. There was evidence tending

to prove that it was a cold, blustering, snowy day, with the wind blowing from the deceased partially toward the approaching locomotive, snow plough and tender; that the deceased's view of such approach was greatly, if not wholly, obstructed by piles of logs, until he came within fifteen feet of the track; that when he got within eight or nine feet of the track, and the forefeet of one of his horses were on the track, he looked in the direction of the locomotive, 164 feet distant, but had little or no opportunity to observe its speed, and was struck and killed while in the act of crossing. It was there contended, in support of the judgment, that the deceased "rashly and recklessly rushed" upon the track in front of the coming locomotive; but this court held that the question of contributory negligence was for the jury. On the other hand, the engineer admitted that he saw the team headed to cross the track, and within eight or nine feet from it, when he was 540 feet from the crossing; and yet it appears that the locomotive could have been readily stopped within the distance of 300 or 350 feet, but that no whistle was blown, no bell was rung, the speed was not slackened, and the engine was not reversed until after the fatal shock; and so it was held to be a question for the jury, whether the engineer, after discovering the negligence, if any, of the deceased, might not, by the exercise of reasonable care and diligence, have avoided the accident. Thus it appeared in that case from the evidence that the engineer, with the admitted knowledge of imminent peril to the team and its driver, allowed his locomotive to pass over a distance of 540 feet without doing anything whatever to prevent the collision. If such were the facts, then his conduct was certainly reckless or wanton, which this court has frequently characterized as gross negligence. True, it was there said, in referring to adjudications in other jurisdictions, that "such supervening negligence \* \* \* need not be gross negligence in order to authorize a recovery."

Certainly, different courts and law writers do not all agree as to the most apt language to express the different degrees of negligence. This court, unlike many others has, ever since the first year of its organization, recognized three degrees of negligence, as slight, ordinary and gross. Thus, in *Richards v. Sperry*, 2 Wis. 216, in an opinion by WHITON, Ch. J., the judgment against the defendant was reversed because the trial court refused to instruct the jury to the effect that they must find for

the defendants unless they found that they were guilty of gross negligence, carelessness, or intentional wrong, but did give the instructions with the word "gross" omitted. In *Stucke v. M. & M. R. Co.*, 9 Wis. 213, the defendant's cow was negligently allowed to go upon the defendant's track, and DIXON, Ch. J., stated the rule thus: "Where the facts show such a degree of rashness or wantonness on the part of the servants of the company as evinces a total want of care for the safety of the cattle, or a willingness to destroy them, though such distinction may not have been intentional, we think \* \* \* the company responsible unless it appears that the plaintiff was *equally* negligent." The term "gross negligence" is frequently used in the opinion. In *Chicago & N. W. R'y Co. v. Goss*, 17 Wis. 428, in an opinion by the same chief justice, in a similar case, the same rule was followed; but the court held that the mere fact that the cattle were trespassing at the time upon the track did not relieve the company from liability for gross negligence in killing them, unless they were so trespassing with the owner's knowledge or through his neglect. The same rules were followed and the same distinctions made in *Bennett v. Chicago & N. W. R'y Co.*, 19 Wis. 145; *Galpin v. Chicago & N. W. R'y Co.*, 19 Wis. 604; *Fisher v. Farmers' Loan & Trust Co.*, 21 Wis. 76; *Potter v. Chicago & N. W. R'y Co.*, 21 Wis. 372, 377, 7 Am. Neg. Cas. 157; *Cunningham v. Lyness*, 22 Wis. 245; *Butler v. M. & St. P. R. Co.*, 28 Wis. 487. In *Dreher v. Fitchburg*, 22 Wis. 675, Mr. Justice PAINE reviewed the subject and said: "Negligence has long been divided into three degrees, slight, ordinary and gross." He then defines slight negligence and ordinary negligence. That opinion and such classification of the three degrees of negligence are fully approved in an opinion by DIXON, Ch. J., in *Ward v. M. & St. P. R. Co.*, 29 Wis. 144, and he therein corrects some erroneous expressions in some of the former cases above cited. But the cases maintaining such distinction are too numerous to mention. A certain class of them, as to what constitutes gross negligence, were cited by Mr. Justice TAYLOR in an elaborate opinion in *Annas v. M. & N. R. Co.*, 67 Wis. 46, 61, 10 Am. Neg. Cas. 546. See, also, *Schmolze v. Chicago, M. & St. P. R'y Co.*, 83 Wis. 667; *Lynch v. N. P. R. Co.*, 84 Wis. 352 (1).

1. The Wisconsin authorities referred as follows (arranged in chronological to in the opinion of the case at bar are order):

Such classification of the degrees of negligence may not be the most philosophical or accurate, but it is such as was firmly established in the jurisprudence of this State long before any who now occupy this bench became members of this court. It has certainly been steadily and firmly adhered to during the last fifteen years. The Supreme Court of the United States, as indicated in the

*Falling object.* — *RICHARDS v. SPERRY*, 2 Wis. 216 (1853), was an action for damages occasioned by the accidental falling of a tree by plaintiffs in error (defendants below), upon a yoke of oxen belonging to defendant in error, whereby one of the oxen was greatly injured.

*Animals injured on track.* — *STUCKE v. MILWAUKEE & MISSISSIPPI R. R. CO.*, 9 Wis. 202 (1859), was an action for damages for killing of plaintiff's cow, run over by train on track; the degrees of negligence fully stated by Dixon, Ch. J.

*CHICAGO & NORTHWESTERN R'Y CO. v. GOSS*, 17 Wis. 428 (1863), negligent killing of plaintiff's colts at crossing; the degrees of negligence again stated by Dixon, Ch. J., and the *STUCKE* case (preceding paragraph), followed.

*BENNETT v. CHICAGO & NORTHWESTERN R'Y CO.*, 19 Wis. 145 (1865), colt injured on track; degrees of negligence stated by Cole, J., citing the *STUCKE* and *Goss* cases (preceding paragraphs).

*GALPIN v. CHICAGO & N. W. R'Y CO.*, 19 Wis. 604 (1865), cattle killed at crossing; degrees of negligence stated by Dixon, Ch. J., citing the *Goss* case, 17 Wis. 428 (*supra*).

*Passenger injured.* — *POTTER v. CHICAGO & NORTHWESTERN R'Y CO.*, 21 Wis. 372, is reported in 7 Am. Neg. Cas. 157. See also former decision in 20 Wis. 533, 7 Am. Neg. Cas. 154.

*Accident at ferry.* — *CUNNINGHAM v. LYNES*, 22 Wis. 245 (1867), team driving off ferryboat onto dock and striking against plaintiff's wife, pushing her into the river; judgment for plaintiff reversed, it being held that there

can be no recovery if plaintiff was guilty of negligence (though it was *slight* and defendant's negligence was *gross*) contributing directly to the injury.

*Defective highway.* — *DREHER v. TOWN OF FITCHBURG*, 22 Wis. 675 (1868), person driving injured on defective highway; degrees of negligence stated by Paine, J.

*Collision at crossing.* — *BUTLER v. MILWAUKEE & ST. PAUL R'Y CO.*, 28 Wis. 487 (1871), collision between wagon and train at crossing; person driving killed; division of train at crossing; failure to have person on lookout or flagman at crossing; gross negligence on part of railway company; judgment for plaintiff for \$3,000 affirmed.

*Railroad fire.* — *WARD v. MILWAUKEE & ST. PAUL R'Y CO.*, 29 Wis. 144 (1871), warehouse destroyed by fire caused by emission of sparks from defendant's locomotive; degrees of negligence stated and the authorities reviewed by Dixon, Ch. J.

*Collision at crossing.* — *WILLIAMS v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.*, 64 Wis. 1 (1885), team and wagon injured in collision with train at crossing; negligence of driver in failing to look before crossing; judgment for defendant affirmed (it being held that failure of railway company to give statutory signals does not excuse contributory negligence of persons at crossing).

*Passenger injured in collision.* — *ANNAS v. MILWAUKEE & NORTHERN R. CO.*, 67 Wis. 46, is reported in 10 Am. Neg. Cas. 546.

*Collision at crossing.* — *SEEFELD v.*

opinion of Mr. Justice DAVIS, in *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 494, 495, has repeatedly "expressed its disapprobation of" such "attempts to fix the degree of negligence by legal definitions." Among the reasons there given in a quotation from an opinion by Mr. Justice CURTIS, is that the signification of such definitions "necessarily varies according to the circumstances." He then refers to some English cases, and says: "'Gross negligence' is a relative term. It is, doubtless, to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence;' but, after all, it means the absence of the care that was necessary under the circumstance." Other courts of high standing have taken a similar view of the subject. As an original proposition it may have been more philosophical and wise. Some law writers, some judges and some courts habitually use the terms, "intentional negligence," "wilful negligence," "malicious negligence;" but most of them very properly repudiate such expressions as contradictory and absurd.

**CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.**, 70 Wis. 216 (1887), collision between wagon and train at crossing; view of traveler obstructed requires him to stop and look for train before crossing track; judgment for defendant affirmed on ground of contributory negligence.

*Walking on track.* — SCHILLING, **ADM'X v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.**, 71 Wis. 255 (1888), plaintiff's intestate killed by freight train while walking upon track; judgment of nonsuit affirmed. (The Schilling case is sufficiently stated, as to the facts, in the opinion in the case at bar.)

*Collision at crossing.* — VALIN, **ADM'R v. MILWAUKEE & NORTHERN R. R. CO.**, 82 Wis. 1 (1892), plaintiff's intestate killed while driving across track, the team being struck by train at crossing; judgment on verdict directed for defendant reversed, the question of negligence being for the jury. (The facts in the Valin case are sufficiently stated in the opinion in the case at bar.)

*Walking across track.* — HANSEN *v.* **CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.**, 83 Wis. 631 (1892), plaintiff's intestate

attempting to cross track in front of engine without looking to see if it was approaching; judgment for plaintiff for \$5,000 reversed on ground of contributory negligence.

**SCHMOLZE v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.**, 83 Wis. 659 (1893), plaintiff walking across track without looking for trains, struck by a locomotive; contributory negligence; judgment for \$4,000 reversed; motion for rehearing denied.

*Animal killed on track.* — LYNCH *v.* **NORTHERN PACIFIC R. R. CO.**, 84 Wis. 348 (1893), plaintiff's horses killed and injured on railroad track; judgment for plaintiff reversed, evidence not sufficient to sustain finding that engineer of train was guilty of gross negligence.

*Employee injured.* — WILBER *v.* **WISCONSIN CENTRAL CO.**, 86 Wis. 535 (1893), railroad employee, a fireman, struck by "kicked" cars while walking through switch yard; judgment for plaintiff for \$6,970 reversed on ground of contributory negligence.

*Collision at crossing.* — HAETSCH, **ADM'X v. CHICAGO & NORTHWESTERN**

16 Am. & Eng. Ency. of Law, 392, 399, and cases cited in the notes.

The distinguishing characteristic of negligence is inadvertence, or an absence of any intent to injure. Where there is simply an absence of that degree of care in the performance of duty, which persons of extraordinary prudence are accustomed to use, the same has been designated by this court as "slight negligence." Where there is a want of such care as persons of ordinary prudence observe in the performance of duty, the same has been designated by this court as "ordinary negligence;" and that includes not only mere inadvertence or inattention to duty, resulting in an injury to another, but also a want of the means or capacity to prevent such injury when the same is known to be imminent. On the other hand, where a person, in the presence of imminent danger to another, has a duty to perform to prevent danger and the present means and capacity to prevent it, rashly,

R'y Co., 87 Wis. 304 (1894), plaintiff's intestate killed while driving across track at night; failure to look and listen for train contributory negligence; judgment for plaintiff reversed. It was also held that "the fact that the train was five minutes behind its usual time was no excuse for a failure to look or listen." Also that "the principle which relieves one from responsibility for the consequences of an error of judgment in choosing the best means of escape from imminent peril in which he is suddenly placed, is not applicable where he is placed in the perilous position by his own negligence."

*Boy injured on track.* — LOFDAHL v. MINNEAPOLIS, ST. PAUL & SAULT STE MARIE R'y Co., 88 Wis. 421 (1894), boy sixteen years old standing with back to freight engine, injured by movement of engine; judgment for plaintiff reversed on ground of contributory negligence.

*Injured at street crossing.* — SCHLIMGEN, ADM'R v. CHICAGO, MILWAUKEE & ST. PAUL R'y Co., 90 Wis. 186 (1895), person crossing track at street crossing, having been standing near track

talking to a railroad employee struck by train from which engine had been detached; failure to look for approaching train contributory negligence; judgment for plaintiff reversed.

NOLAN v. MILWAUKEE, LAKE SHORE & WESTERN R'y Co., 91 Wis. 16 (1895), plaintiff crossing track at street crossing injured by engine passing over his foot; judgment of nonsuit affirmed on ground of contributory negligence. (The fourth paragraph of the syllabus to the report states the case as follows: "One who was injured at a street crossing by a locomotive in front of which he stepped after having stopped near the track with his back to the direction whence it came, and which he certainly would have seen had he looked in that direction before stepping on the track, is held to have been guilty of contributory negligence. Such negligence was not palliated by the fact that, just before stopping he had seen the locomotive standing still about 200 feet away; nor was he absolved from the duty to look before stepping on the track by the negligence of those in charge of the locomotive in the manner of running it to the crossing.")

such other person from being injured, and, with knowledge of the recklessly or wantonly fails to do what he can to prevent such injury, the same has been designated by this court as "gross negligence." Within the rules stated, we must hold that the motorman, in the case at bar, was not guilty of gross negligence, but at most, of ordinary negligence.

3. The car appears to have been inspected the morning of the accident and also immediately after the accident; and the undisputed evidence is that it was at both times found to be in good condition. There was no error, therefore, in the court's directing the jury to find that the car was not in a defective condition at the time of the accident.

We perceive no reversible error in the record.

BY THE COURT. — The judgment of the Circuit Court is affirmed. PINNEY, J., dissents.

PERSON WALKING ON RAILROAD TRACK KILLED BY TRAIN — TRESPASSER — INTOXICATION — CONTRIBUTORY NEGLIGENCE — INSTRUCTION. — In *ANDERSON v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y CO.*, 87 Wis. 195 (1894), where plaintiff's intestate was killed by train while walking over railroad trestle, judgment for plaintiff for \$5,000 was reversed for erroneous admission of evidence and erroneous charge as to contributory negligence, and that the deceased was a trespasser on the track. ORTON, Ch. J., dissented. The syllabus to the official report states the case as follows:

"1. Plaintiff's intestate was killed by defendant's train while he was walking over a trestle on which defendant's main track was laid, and which was distant from any station, depot grounds, or yard. The trestle was 120 feet long and was so built as to repel rather than to invite foot travel over it, being unplanked and so narrow as to leave no room on it outside of a passing train. It was crossed daily by a dozen regular trains; besides others. *Held*, that no license to use the trestle as a footway could be implied from its customary use by pedestrians for that purpose — especially in view of § 1811, R. S., making it unlawful for any person not connected with the railroad to walk along the track except when it is laid along a public road or street, — and that the deceased was therefore a trespasser, to whom defendant owed no special duty to keep a lookout to discover his presence on the track."

[ORTON, Ch. J., was of the opinion that notwithstanding § 1811, R. S., there may be an implied license to walk along a railroad track at other places than along a public road or street.]



"2. Evidence that for a few days after the accident trains were run more slowly over the trestle was not admissible to show negligence in running the train at a dangerous rate of speed at the time of the accident.

"3. An instruction to the jury that if there was no contributory negligence on the part of the deceased the defendant would be liable even if the deceased was intoxicated at the time he lost his life, was erroneous, since, whether he was intoxicated or not, the deceased could not, under the circumstances, be held free from contributory negligence."

The opinion in the Anderson case, *supra*, was rendered by Pinney, J., who cited many authorities where it has been held negligence *per se* to walk on a railway track, and sufficient to defeat recovery in case of injury by trains. Among the Wisconsin cases cited were Townley v. Chicago, Milwaukee & St. Paul R'y Co., 53 Wis. 626; Johnson v. Chicago & N. W. R'y Co., 56 Wis. 274; Whalen v. Chicago & N. W. R'y Co., 75 Wis. 654. As to licensees and trespassers, the cases cited were Townley v. Chicago, M. & St. P. R'y Co., 53 Wis. 626; Whalen v. Chicago & N. W. R'y Co., 75 Wis. 654; Davis v. Chicago & N. W. R. Co., 58 Wis. 646; Delaney v. M. & St. P. R'y Co., 33 Wis. 67; Johnson v. L. S. T. & T. Co., 86 Wis. 64; Hooker v. Chicago, M. & St. P. R'y Co., 76 Wis. 542; McDonald v. Chicago, M. & St. P. R'y Co., 75 Wis. 128. (Tomkins & Merrill and S. L. Perrin (W. M. Tomkins and Thos. Wilson, of counsel), appeared for appellant railway company; John F. Dufur and Cate, Jones & Sanborn (John F. Dufur and D. Lloyd Jones, of counsel), for respondent.)

#### NOTES OF WISCONSIN CASES RELATING TO COLLISIONS AT CROSSINGS AND INJURIES TO PERSONS ON TRACK, ETC.

Among the numerous Wisconsin cases arising out of accidents at crossings (other than those reported in this volume of AM. NEG. CAS.), are the following:

##### **Collisions between wagons and trains at crossings.**

MILWAUKEE & CHICAGO R'Y Co. v. HUNTER, 11 Wis. 160 (1860), collision between wagon and train at crossing; judgment for plaintiff for \$7,000 affirmed.

DUFFY v. CHICAGO & NORTHWESTERN R'Y Co., 32 Wis. 269 (1873), collision between wagon and train at crossing; judgment of nonsuit reversed.

HORN v. CHICAGO & NORTHWESTERN R'Y Co., 38 Wis. 463 (1875), collision between wagon and train; judgment for plaintiff reversed.

URBANEK v. CHICAGO, MILWAUKEE & ST. PAUL R'Y Co., 47 Wis. 59 (1879), collision between wagon and train; judgment for plaintiff for \$2,745 affirmed.

EILERT v. GREEN BAY & MINNESOTA R. Co., 48 Wis. 606 (1879), collision between wagon and train; judgment for plaintiff for \$1,443 affirmed (following and approving the ruling in the Urbanek case, preceding paragraph).

WINSTANLEY, ADM'R *v.* CHICAGO, MILWAUKEE & ST. PAUL R'Y CO., 72 Wis. 375 (1888), collision between wagon and train at crossing, and plaintiff's intestate thrown out of wagon and killed; judgment for \$1,500 affirmed.

DUAME, ADM'X *v.* CHICAGO & NORTHWESTERN R'Y CO., 72 Wis. 523 (1888), collision between carriage and train at crossing, and driver killed; judgment on verdict directed for defendant reversed.

MCDONALD ET AL., ADM'RS *v.* CHICAGO, MILWAUKEE & ST. PAUL R'Y CO., 75 Wis. 121 (1889), collision between wagon and train on track and driver killed; contributory negligence; judgment for plaintiff for \$5,250 reversed; *held*, that the fact that the deceased was intoxicated did not excuse his negligence.

In MCKINNEY *v.* CHICAGO & NORTHWESTERN R'Y CO., 87 Wis. 282 (1894), collision between wagon and train at crossing, judgment of nonsuit affirmed, it appearing (as per syllabus to the report) that "plaintiff, an aged man, blind of one eye and dull of hearing, was driving in a covered buggy with side curtains; as he approached the crossing, with which he was familiar, he saw two trains pass in the same direction; he waited for the second train to pass, and then, without looking for others, he drove upon the track, where he was struck and injured by a third train which was following closely after the second, and which he might have seen had he looked."

But see WARD *v.* CHICAGO, ST. PAUL, MINN. & OMAHA R. R. CO., 85 Wis. 601 (1893), where a traveler watched and waited for a freight train to cross the highway, and then drove on the track without looking and was struck by a detached car which was following the freight train at a little distance. It was *held* that, under the circumstances, he was not bound to look in the direction of the detached car, because his attention was diverted by the first train.

STEINHOFEL, ADM'R *v.* CHICAGO, MILWAUKEE & ST. PAUL R'Y CO., 92 Wis. 123 (1896), person driving at night across track killed in collision at crossing; failure to look for approaching train; judgment on verdict directed for defendant affirmed on ground of contributory negligence, even where statutory signal was not given.

In GROESBECK, ADM'X *v.* CHICAGO, MILWAUKEE & ST. PAUL R'Y CO., 93 Wis. 505 (1896), collision at crossing, judgment directed for defendant was affirmed, the syllabus to the report stating the case as follows: "Plaintiff's intestate was killed while attempting to drive over a highway crossing, on a damp, foggy evening, by a train running about sixty miles an hour. He was a careful driver, familiar with the crossing, and his horse was well broken and easily managed. He was driving at a moderate speed, and his horse pursued an even gait clear up to the crossing. At any point within 500 feet from the crossing he might have seen the headlight of the engine continuously after it came within three-fourths of a mile from the crossing. No one saw the accident. *Held*, that although a statute limited the speed of the train when it crossed that highway to fifteen miles an hour, and the deceased had the right to act upon the assumption that it would not run at a greater speed, he was nevertheless guilty of contributory negligence, either in failing to look at all or in deliberately taking the risk of attempting to cross in front of the train." (*Haetsch v. Chicago & N. W. R'y Co.*, 87 Wis. 304, compared and distinguished.)

BOWER *v.* CHICAGO, MILWAUKEE & ST. PAUL R'Y CO., 61 Wis. 457 (1884), vehicle damaged in collision with train at crossing; judgment for plaintiff for \$175 affirmed.

MCDERMOTT *v.* CHICAGO, MILWAUKEE & ST. PAUL R'Y CO., 91 Wis. 38 (1895),

person injured while driving over defective crossing with a bobsleigh on which was a wagon box loaded with timber on which he was standing at time of accident; judgment for plaintiff for \$3,000 affirmed.

#### Horses frightened by noise of train.

*BUTLER, ADM'X v. MILWAUKEE & ST. PAUL R'Y CO.*, 28 Wis. 487 (1871), plaintiff's intestate attempting to control horse which had been standing near track and had taken fright at passing train, struck and killed by train which had been divided at crossing, the horse having forced the deceased onto the track; judgment for plaintiff for \$3,000 affirmed.

*RANSOM v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y CO.*, 62 Wis. 178 (1885), horse attached to buggy driven by plaintiff's wife, frightened by train approaching crossing, running away and upsetting vehicle, killing the wife and injuring two of plaintiff's children, and damaging the wagon and horse; order sustaining demurrer to declaration overruled.

*ABBOTT ET AL. (TRUSTEES OF WISCONSIN CENTRAL R. R. CO.) v. KALBUS*, 74 Wis. 504 (1889), horse frightened by switching locomotive at street crossing and person driving thrown out of wagon and injured; judgment for plaintiff for \$1,000 reversed for refusal to instruct on question of defendant's negligence, where there was no evidence showing negligence in operation of switching.

See also *ABBOTT ET AL. (TRUSTEES OF WISCONSIN CENTRAL R. R. CO.) v. DWINNELL*, 74 Wis. 514 (1889), accident similar to the Kalbus case (preceding paragraph), in which judgment for plaintiff for \$2,000 was reversed.

*CAHOON v. CHICAGO & NORTHWESTERN R'Y CO.*, 85 Wis. 570 (1893), horse frightened by steam from locomotive at street crossing, running away, upsetting wagon and injuring plaintiff; judgment of nonsuit affirmed.

*LEITCH v. CHICAGO & NORTHWESTERN R'Y CO.*, 93 Wis. 79 (1896), horse frightened by train at crossing, running away, upsetting buggy and injuring plaintiff; judgment for plaintiff reversed.

#### Collisions between vehicles and street cars.

In *BOERTH v. WEST SIDE R. R. CO.*, 87 Wis. 288 (1894), it was held (as per syllabus to the report), that one who attempts to drive across the track of an electric street railway while seated so far back in a covered wagon that he cannot see an approaching car, which otherwise he might have easily seen, is guilty of negligence barring a recovery for injuries caused by a collision with such car, and judgment on verdict directed for defendant affirmed.

*JOHNSON v. SUPERIOR RAPID TRANSIT R'Y CO.*, 91 Wis. 233 (1895), person riding in phaeton injured in collision with street car and vehicle; judgment for plaintiff for \$1,620 reversed for erroneous instructions.

See also *JONES v. SUPERIOR RAPID TRANSIT R'Y CO.*, 91 Wis. 562 (1895), action arising out of same accident as the Johnson case (preceding paragraph), in which judgment for plaintiff for \$3,500 was reversed on the ruling in the Johnson case.

See also *LITTLE v. SUPERIOR RAPID TRANSIT R'Y CO.*, 88 Wis. 402 (1894), action arising out of same accident as in the Johnson and Jones cases (preceding paragraphs), in which judgment for plaintiff for \$1,500 was reversed.

*BISHOP, ADM'R v. BELLE CITY STREET R'Y CO.*, 92 Wis. 139 (1896), collision between wagon and electric street car, horse being frightened by car, and driver of horse killed; railroad company not liable and judgment for plaintiff reversed.

In *THORESEN, ADM'R v. LA CROSSE CITY R'Y CO.*, 87 Wis. 597 (1894), collision between street car and wagon in which the driver of wagon sustained fatal injuries, judgment of nonsuit was reversed, it being held that the evidence was sufficient to submit case to the jury on the question of negligence of the parties. It was held (as per syllabus) that "an ordinance providing that any team or vehicle meeting or being overtaken by a street car shall give way to the car, gives the driver of the car no right to ignore or disregard the presence of other vehicles on the street, especially at street crossings;" and that "it is the duty of a street-car driver to exercise the highest degree of care to avoid collision or accident, especially at street crossings." \* \* \*

See also *THORESEN, ADM'R v. LA CROSSE CITY R'Y CO.*, 94 Wis. 129 (1896), collision between street car and wagon, the driver of the wagon being killed; judgment for plaintiff for \$1,500 affirmed.

*EASTWOOD v. LA CROSSE CITY R'Y CO.*, 94 Wis. 163 (1896), plaintiff riding in bobsleigh drawn by two horses injured in collision between sleigh and street car; horse frightened by electric car; street-railway company not liable, evidence not justifying inference of motorman's negligence; street car not obliged to stop every time horse or team shows fright; judgment of nonsuit affirmed.

#### **Collisions between vehicles on highway.**

*O'MALEY v. DORN*, 7 Wis. 236 (1859), collision between vehicles on highway; judgment for plaintiff.

*DRESSLER v. DAVIS ET AL.*, 7 Wis. 527 (1859), collision between vehicles on highway; judgment for defendants in the County Court reversed.

#### **Pedestrians injured on track.**

*LANGHOFF, ADM'R v. MILWAUKEE & PRAIRIE DU CHIEN R'Y CO. ET AL.*, 19 Wis. 489 (1865), plaintiff's intestate fatally injured while crossing track; judgment of nonsuit reversed.

See subsequent decision in the *LANGHOFF* case, 23 Wis. 43 (1868), where judgment for plaintiff for \$10,000 was reversed on the ground of contributory negligence.

*ROTHER, ADM'R v. MILWAUKEE & ST. PAUL R'Y CO.*, 21 Wis. 256 (1866), plaintiff's intestate killed while crossing track; contributory negligence; judgment of nonsuit affirmed.

*DELANEY v. MILWAUKEE & ST. PAUL R'Y CO.*, 33 Wis. 67 (1873), person standing on track watching train on other track, but not looking for train on track on which he was standing struck by train; judgment for plaintiff reversed; rehearing denied.

*KEARNEY, ADM'R v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.*, 47 Wis. 144 (1879), person hearing whistle of approaching train running along track to get to his team, which was standing near track, struck and killed by train; judgment for plaintiff reversed.

*HARTWIG, ADM'X v. CHICAGO & NORTHWESTERN R'Y CO.*, 49 Wis. 358 (1880), plaintiff's intestate injured by falling into excavation or cattle guard while walking from depot, on a dark and stormy night, down the track to take train on which he intended to travel, the passenger train having stopped at place where passengers were led to infer that way to train was safe; judgment for plaintiff affirmed.

HOYE, ADM'R *v.* CHICAGO & NORTHWESTERN R'Y CO., 62 Wis. 666 (1885), plaintiff's intestate killed by freight train at street crossing; judgment of nonsuit reversed.

See subsequent decision in the HOYE case, 67 Wis. 1 (1886), where judgment on verdict directed for defendant was reversed.

FERGUSON *v.* WISCONSIN CENTRAL R. R. CO. ET AL., 63 Wis. 145 (1885), person crossing track at street crossing struck by detached car following an engine; judgment for plaintiff for \$8,000 affirmed.

WINCHELL *v.* ABBOTT ET AL. (TRUSTEES OF RAILROAD COMPANY), 77 Wis. 371 (1890), person struck by locomotive at street crossing; judgment for plaintiff for \$1,000 affirmed.

JOHNSON *v.* LAKE SUPERIOR TERMINAL & TRANSFER CO., 86 Wis. 64 (1893), person walking between rails of track struck by locomotive running backward in same direction as person was walking, judgment for plaintiff for \$6,000 affirmed (injuries, foot injured necessitating amputation).

#### Children run over on track.

EWEN *v.* CHICAGO & NORTHWESTERN R'Y CO., 38 Wis. 613 (1875), boy about nine years of age run over and killed by train; judgment for plaintiff for \$2,500 affirmed.

HAAS, ADM'R *v.* CHICAGO & NORTHWESTERN R'Y CO., 41 Wis. 44 (1876), boy about ten years of age running across track in front of train and run over and killed; judgment for plaintiff reversed.

TOWNLEY *v.* CHICAGO, MILWAUKEE & ST. PAUL R'Y CO., 53 Wis. 626 (1881), child seven years of age injured by being struck by train while crossing track on way home from school; judgment of nonsuit reversed.

JOHNSON, ADM'R *v.* CHICAGO & NORTHWESTERN R'Y CO., 56 Wis. 274 (1882), child about seven years of age killed by switch engine while crossing track; judgment of nonsuit reversed.

See also former decision in the JOHNSON case, 49 Wis. 529, where judgment of nonsuit was reversed.

HOPPE, ADM'R *v.* CHICAGO, MILWAUKEE & ST. PAUL R'Y CO., 61 Wis. 357 (1884), child sixteen months old wandering from custody of brother seven years old, and run over and killed by train; judgment for plaintiff for \$1,000 affirmed.

See also DAHL, ADM'R *v.* MILWAUKEE CITY R'Y CO., 62 Wis. 652 (1885), where child between four and five years of age was run over and killed by street car, and judgment of nonsuit was reversed, it being held that the case should have been submitted to jury. Citing the HOPPE case (preceding paragraph).

HEDDLES *v.* CHICAGO & NORTHWESTERN R'Y CO., 74 Wis. 239 (1889), boy about seven years old run over and injured by train at street crossing; judgment for plaintiff reversed for numerous errors on the trial.

In the HEDDLES case, *supra*, a verdict for \$30,000 for an injury to a boy about seven years of age, both of his legs having to be amputated, was held excessive.

WHALEN *v.* CHICAGO & NORTHWESTERN R'Y CO., 75 Wis. 654 (1890), boy about thirteen years old injured by freight train backing slowly on side track where it was known people were likely to be; failure to provide lookout to warn people of danger held to be negligence; judgment for plaintiff for \$5,000 affirmed (injuries, foot crushed, necessitating amputation).

HOOKE, ADM'R *v.* CHICAGO, MILWAUKEE & ST. PAUL RY. CO., 76 Wis. 542 (1890), plaintiff's intestate, a child about five years old, in care of elderly

woman, walking on railroad bridge, killed by train running at prohibited speed within city limits; judgment for plaintiff affirmed.

MASON *v.* CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y Co., 89 Wis. 156 (1894), child between three and four years of age run over on switch track in railroad yard; judgment of nonsuit reversed, it being question for jury whether the place where the child was injured was a licensed path for travelers binding the railroad company to keep lookout for children on track.

OLWELL, ADM'R *v.* MILWAUKEE STREET R'Y Co., 92 Wis. 330 (1896), boy two years and seven months old run over and killed by street car; judgment for plaintiff for \$1,500 affirmed.

#### **Animals injured or killed on track.**

See PRITCHARD *v.* LA CROSSE & MILWAUKEE R. R. Co., 7 Wis. 232; MCCALL *v.* CHAMBERLAIN, 13 Wis. 637; FISHER *v.* FARMERS' LOAN & TRUST Co., 21 Wis. 76; PITZNER *v.* SHINNICK, 39 Wis. 129; JONES *v.* SHEBOYGAN & FOND DU LAC R. R. Co., 43 Wis. 306; CURRY *v.* CHICAGO & N. W. R'Y Co., 43 Wis. 665; RICHARDSON *v.* CHICAGO & NORTHWESTERN R'Y Co., 56 Wis. 346; STUCKE *v.* MILWAUKEE & MISSISSIPPI R. R. Co., 9 Wis. 202; CHICAGO & N. W. R'Y Co. *v.* GOSS, 17 Wis. 428; BENNETT *v.* CHICAGO & N. W. R'Y Co., 19 Wis. 145; GALPIN *v.* CHICAGO & N. W. R'Y Co., 19 Wis. 604; LYNCH *v.* NORTHERN PACIFIC R. R. Co., 84 Wis. 348; JAEGER *v.* CHICAGO, MILWAUKEE & ST. PAUL R'Y Co., 75 Wis. 131; JONES *v.* CHICAGO, MILWAUKEE & ST. PAUL R'Y Co., 77 Wis. 585; PETERSON *v.* NORTHERN PACIFIC R. R. Co., 86 Wis. 206.

#### *Animal killed on track — Wyoming case.*

In SCHENK *v.* UNION PACIFIC R'Y Co. ET AL., 5 Wyo. 430 (1895), action for killing of plaintiff's cow which was run over by defendant's train, it was held (on reserved questions) that defendants were not liable for killing of cow without reference to question of negligence, and that the Wyoming statute rendering railway companies liable for killing of live stock on track *in the absence of negligence* was unconstitutional to the extent specified (absence of negligence).

## **GRAND TRUNK RAILWAY COMPANY *v.* IVES (1).**

*United States Supreme Court, April, 1892.*

[Reported in 144 U. S. 408.]

**DEGREES OF NEGLIGENCE — DEFINITION.** — The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men have a relative significance, and cannot be arbitrarily defined.

1. Affirming Ives *v.* Grand Trunk R'Y Co., 35 Fed. Rep. 176. negligence cases in the State and Federal courts, among which are the

The several points decided in the case of GRAND TRUNK R'Y Co. *v.* IVES, 144 U. S. 408, are cited, approved, distinguished or followed in numerous following decisions, reported in the series of AMERICAN NEGLIGENCE CASES and AMERICAN NEGLIGENCE REPORTS: Jones *v.* Balt. & Ohio R. R. Co., 21

**NEGLIGENCE — QUESTIONS OF LAW AND FACT.** — When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court.

**SPEED OF TRAINS — ORDINANCE — NEGLIGENCE — EVIDENCE.** —

While it has been held in many cases that the running of railroad trains within the limits of a city at a rate of speed greater than is allowed by an ordinance of such city, is negligence *per se*, the better and more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence.

**FLAGMAN AT CROSSING — DUTY OF RAILROAD COMPANY — QUESTION FOR JURY.** — As a general rule, it may be said that whether ordinary care, or reasonable prudence requires a railroad company to keep a flagman stationed at a crossing that is especially dangerous is a question

D. C. 346, 2 Am. Neg. Cas. 319, 324-326 (on the question of whether the court's action in withdrawing case from jury was proper); Ill. Cent. R. R. Co. v. Foley, 53 Fed. Rep. (C. C. A.) 459, 7 Am. Neg. Cas. 470, 475 (when question of negligence for jury and when for court); St. Louis & San Francisco R'y Co. v. Whittle, 74 Fed. Rep. (C. C. A.) 296, 7 Am. Neg. Cas. 492, 512-514 (question of negligence for jury); Adams v. Washington & Georgetown R. R. Co., 9 App. D. C. 26, 9 Am. Neg. Cas. 163, 164 (when court not justified in directing verdict); Omaha St. R'y Co. v. Craig, 39 Neb. 601, 9 Am. Neg. Cas. 547 (on the rule as to when negligence is question of fact or question of law); Mo. Kan. & Tex. R'y Co. v. Turley (Ind. Terr.), 37 S. W. Rep. 52, 9 Am. Neg. Cas. 315, 316 (when question of negligence is for court and when for jury); St. Louis, I. M. & So. R'y Co. v. Spearman, 64 Ark. 332, 3 Am. Neg. Rep. 516, 518, 11 Am. Neg. Cas. 177, 178 (distinguishing the facts from those in the Ives case and holding that the rule in the Ives case as to question of negligence being for jury did not apply in the Spearman case); Le Beau v. Pitt., Cin. & St. L. R'y Co., 69 Ill. App. 557, 2 Am. Neg. Rep. 501, 502 (distinguishing the Ives case and holding that direction of verdict for defendant was proper); Pyle v. Clark, (C. C. A.) 79 Fed. Rep. 744, 2 Am. Neg. Rep. 100, 102, and Clark v. Wright, (C. C. A.) 79 Fed. Rep. 744, 2 Am. Neg. Rep. 100, 102 (question of negligence for jury); Weiss v. Bethlehem Iron Co., 83 Fed. Rep. (C. C. A.) 23, 5 Am. Neg. Rep. 537, 540 (when question of negligence is for court); Cameron v. Kenyon-Connell Commercial Co., (Montana, 1899) 5 Am. Neg. Rep. 647, 654 (rule as to when negligence is for jury and when for court); Oliver v. Denver Tramway Co. (Colo. App., 1899), 7 Am. Neg. Rep. 9, 13 (question of negligence for jury); Costello v. Third Ave. R. R. Co., 161 N. Y. 317, 7 Am. Neg. Rep. 317, n., 10 Am. Neg. Rep. 574, n. (question for jury); King v. Morgan, 109 Fed. Rep. (C. C. A.) 406, 10 Am. Neg. Rep. 200, 210 (when question for court); Bodie v. Charleston & Western R'y Co. (South Carolina, 1901), 10 Am. Neg. Rep. 473, 485 (contributory negligence). See, also, TABLE OF CASES CITED for the references to the Ives case in 12 AM. NEG. CAS., the volume in which the case is reported.

of fact for a jury to determine under all the circumstances of the case, and that the omission to station a flagman at a dangerous crossing may be taken into account as evidence of negligence; although in some cases it has been held that it is a question of law for the court.

**COLLISION AT CROSSING — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.** — Where a person while driving in a buggy was struck and killed by a train running at a rapid rate of speed at a crossing in a city, the question of contributory negligence was properly for the jury to determine.

**CONTRIBUTORY NEGLIGENCE AS A DEFENSE — RULE.** — Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to the qualification that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence.

**ERROR** to the Circuit Court of the United States for the Eastern District of Michigan. The facts are stated in the opinion. *Judgment for plaintiff for \$5,000 affirmed.*

**MR. OTTO KIRCHNER**, for plaintiff in error.

**MR. DON M. DICKINSON**, for defendant in error.

**Mr. Justice Lamar** delivered the opinion of the court, as follows: This was an action by Albert Ives, Jr., as administrator of the estate of Elijah Smith, deceased, against the Grand Trunk Railway Company of Canada, a Canadian corporation, operating a line of railroad in Michigan, to recover damages for the alleged wrongful and negligent killing of plaintiff's intestate, without fault on his own part, by the railway company, at a street crossing in the city of Detroit. It was commenced in a State court and was afterwards removed into the Federal court on the ground of diverse citizenship. The action was brought under §§ 3391 and 3392 of Howell's Annotated Statutes of Michigan, and, as stated in the declaration, was for the benefit of three daughters and one son of the deceased, whose names were given.

There was a trial before the court and a jury, resulting in a verdict and judgment in favor of the plaintiff for \$5,000, with interest from the date of the verdict to the time the judgment was entered. The plaintiff offered to remit the interest, but the court refused to allow it to be done. The defendant then sued out this writ of error.

On the trial, the plaintiff, to sustain the issues on his part,



offered evidence tending to prove the following facts: Elijah Smith, plaintiff's intestate, at the time of his death in May, 1884, was about seventy-five years of age, and had been residing on a farm, a few miles out of the city of Detroit, for several years, being engaged in grape culture. It was his custom to make one or more trips to the city every day during that period. In going to the city he traveled eastwardly on a much traveled road, known as the "Holden road," which, continued into the city, becomes an important and well-known street, running east and west. Within the limits of the city, the street was crossed obliquely, at a grade, by the defendant's road and two other parallel roads coming up from the southwest, which roads, in the language of the defendant's engineer, curve "away from a person coming down the Holden road." At the crossing the Holden road is sixty-five and one-half feet wide. The defendant's right of way is forty feet wide, and the right of way of all the parallel railways at that place is 160 feet wide.

For a considerable distance, at least 300 feet, along the right side of the road, going into the city there were obstructions to a view of the railroad, consisting of a house, known as the "McLaughlin house," a barn and its attendant outbuildings, an orchard in full bloom, and, about seventy-six feet from the defendant's track, another house, known as the "Lawrence house." Then there were some shrub bushes, or, as described by one witness, some stunted locust trees and a willow, a short distance from the line of the right of way. So that, it seems, from all the evidence introduced on this point, it was not until a traveler was within fifteen or twenty feet of the track, and then going up the grade, that he could get an unobstructed view of the track to the right. One witness testified, that if he was in a buggy, his horse would be within eight feet of the track before he could get a good view of it in both directions.

On the morning of the fatal accident, Mr. Smith and his wife were driving down the Holden road into Detroit, in a buggy with the top raised, and with the side curtains either raised or removed. Opposite the Lawrence house they stopped several minutes, presumably to listen for any trains that might be passing, and while there a train on one of the other roads passed by going out of the city. Soon after it had crossed the road, and while the noise caused by it was still quite distinct, they drove on towards their destination. Just as they had reached the

defendant's track, and while apparently watching the train that had passed, they were struck by one of the defendant's trains, coming from the right, at the rate of at least twenty — some of the witnesses say forty — miles an hour, and were thrown into the air, carried some distance, and instantly killed. This train was a transfer train, between two junctions, and was not running on any schedule time. The plaintiff's witnesses agree, substantially, in saying that the whistle was not blown for this crossing nor was the bell rung, and that no signal whatever of the approach of the train was given until it was about to strike the buggy in which Mr. Smith and his wife were riding. The train ran on some 400 feet or more after striking Mr. Smith before it could be stopped.

It further appeared that an ordinance of the city of Detroit required railroad trains within its limits to run at a rate not exceeding six miles an hour; and it likewise appeared that there was no flagman or any one stationed at this crossing to warn travelers of approaching trains.

Most of the witnesses for the defense, consisting, for the main part, of its employees aboard the train at the time of the accident, testified, substantially, that the ordinary signals of blowing the whistle and ringing the bell were given before reaching the crossing, and that, in their opinion, the train was not moving faster than six miles an hour. It must be stated, however, that some of the defendant's witnesses, the brakeman, among others, would not say that the ordinary signals were given, nor would they testify that the train was not moving faster than at the rate prescribed by the city ordinance; and one of its witnesses, in particular, testified that the train was moving "about twenty miles an hour, perhaps a little faster."

A witness called by the plaintiff in rebuttal, an engineer of forty-five years' standing, who was examined as an expert, testified that if the train ran on after striking Mr. Smith, the distance it was said to have gone before it could be stopped, it must have been going at the rate of twenty-five or thirty miles an hour; and that if it had been going but six miles an hour, as claimed by the defendant, it could have been stopped in the length of the engine, and even without brakes would not have run more than thirty-five feet, if reversed.

The foregoing embraces the substance of all the evidence set forth in the bill of exceptions on the question of how the fatal

accident occurred, and with respect to the alleged negligence of the defendant, in the premises, and also the alleged contributory negligence of Mr. Smith.

At the close of the testimony, the defendant submitted in writing a number of requests for instructions to the jury, which, if they had been given, would have virtually taken the case from the jury and would have authorized them to bring in a verdict in its favor. The court refused to give any of them, in the language requested, but gave some of them in a modified form and embraced others in the general charge. The refusal to give the instructions requested was excepted to, and exceptions were also noted to various portions of the charge as given. As those exceptions are substantially embodied in the assignment of errors, they will not be further referred to here, but such of them as we deem material will be considered in a subsequent part of this opinion.

The first point raised by the defendant and urgently insisted upon, as being embraced in the assignment of errors, is, that there is no evidence in this record that Mr. Smith left any one dependent upon him for support, and that, therefore, no right of action could be in the plaintiff, as his administrator, under the Michigan statutes, against the defendant, for causing his death.

Sections 3391 and 3392 of Howell's Annotated Statutes of Michigan, under which this action was brought, provide as follows:

"Sec. 3391. Whenever the death of a person shall be caused by wrongful act, neglect or default of any railroad company, or its agents, and the act, neglect or default is such as would (if death had not ensued) entitle the party injured to maintain an action and recover damages in respect thereof; then, and in every such case, the railroad corporation, which would have been liable if death had not ensued, shall be liable to an action on the case for damages, notwithstanding the death of the person so injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 3392. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in any such action shall be distributed to the persons, and in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such

amount of damages as they shall deem fair and just to the persons who may be entitled to such damages when recovered: Provided, nothing herein contained shall affect any suit or proceedings heretofore commenced and now pending in any of the courts of this State."

According to the decisions of the Supreme Court of Michigan, bearing upon the construction of these sections, a right of action will not arise for the negligent killing of a person by a railroad company, unless the deceased left some one dependent upon him for support, or some one who had a reasonable expectation of receiving some benefit from him during his lifetime. *Chicago & N. W. R'y Co. v. Bayfield*, 37 Mich. 205; *Van Brunt v. Cincinnati, J. & M. R. R. Co.*, 78 Mich. 530; *Cooper v. Lake Shore & M. S. R'y Co.*, 66 Mich. 261, 12 Am. Neg. Cas. 130, n.

But it seems to us that no question concerning this phase of the case can arise here upon this record. The declaration averred that the action was brought for the benefit of three daughters and one son of the deceased, whose names were given; and the defendant's plea was merely in the nature of a plea of the general issue, stating simply that the defendant "demands a trial of the matters set forth in the plaintiff's declaration." It is true, that, so far as appears from this record, the only evidence with respect to the beneficiaries of the suit named in the declaration was brought out, apparently incidentally, one of plaintiff's witnesses, Mrs. Briscoe, stating that she was the daughter of the deceased, and another witness stating that sometimes Mr. Smith's son went to town to attend to the sale of his farm products.

We should bear in mind, however, that it is not for this court to say that the entire evidence in the case is set forth in the bill of exceptions, for that would be to presume a direct violation of a settled rule of practice as regards bills of exceptions, viz., that a bill of exceptions should contain only so much of the evidence as may be necessary to explain the bearing of the rulings of the court upon matters of law, in reference to the questions in dispute between the parties to the case, and which may relate to exceptions noted at the trial. A bill of exceptions should not include, nor, as a rule, does it include, all the evidence given on the trial upon questions about which there is no controversy, but which it is necessary to introduce as proof of the plaintiff's right to bring the action, or of other matters of like nature. If such evidence be admitted without objection, and no point be made

at the trial with respect to the matter it was intended to prove, we know of no rule of law which would require that even the substance of it should be embodied in a bill of exceptions subsequently taken. On the contrary, to incumber the record with matter not material to any issue involved has been repeatedly condemned by this court as useless and improper. *Pennock v. Dialogue*, 2 Pet. 1, 15; *Johnston v. Jones*, 1 Black, 209, 219, 220; *Zeller's Lessee v. Eckert*, 4 How. (U. S.) 289, 297.

But, as the record fails to show that any exception was taken at the trial based upon the lack of any evidence, in this particular, we repeat, it is not properly presented to this court for consideration. If the defendant deemed that the court below erroneously made no reference in its charge to the jury to the lack of any evidence in the record respecting the existence of any beneficiaries of the suit, it should have called that matter to the attention of the court at that time, and insisted upon a ruling as to that point. Failing to do that, and failing also to save any exception on that point, it must be held to have waived any right it may have had in that particular. The only exception taken on the trial and embodied in the assignment of errors that can, by any latitude of construction, be held to refer to this point, is the eighth request for instructions, which was refused, and which refusal is made the basis of the sixth assignment of error. That request is as follows: "The court is requested to instruct the jury that under the evidence in this case the plaintiff is not entitled to recover, and their verdict must be for defendant." But the context and the reason given by the court for its refusal to give the instruction clearly show that that request was not aimed at this point, but related solely to the question of negligence on the part of the defendant company and the alleged contributory negligence of the party killed. That this request for instructions meant what the court understood it to mean, and had no reference whatever to the question of evidence respecting the existence of the beneficiaries named in the declaration, is further shown by the fact that the court in its general charge assumed that such evidence had been introduced, and also by the fact that the ninth request of the plaintiff in error for instructions to the jury likewise proceeded on that assumption. That request is as follows: "The damages in cases of this kind are entirely pecuniary in their nature, and the jury must not award damages beyond the amount *the evidence shows the children would*

*probably have realized from deceased had he continued to live. Nothing can be given for injured feelings or loss of society."*

Furthermore, this assignment of error is too broad and general, under the 21st rule of this court, to bring up such a specific objection as it seeks to do. This court should not be put to the labor and trouble of examining the whole of the evidence to see whether there was enough for the verdict below to have rested upon. But any objection made to the nonexistence of evidence to support the verdict and judgment below should, in the language of the rule, "set out separately and particularly each error asserted and intended to be urged." *Van Stone v. Stillwell & Bierce Manufacturing Co.*, 142 U. S. 128. In our opinion, therefore, this point raised by the plaintiff in error is without merit. As to whether, as a matter of fact, there was evidence respecting the existence of any beneficiaries to this action, we do not, of course, express any opinion. In the view above taken of the matter, it is not necessary to decide that point. The legal presumption is that there was; and we shall proceed to consider the other assignments of error upon that presumption.

These assignments of error, so far as we can consider them, properly relate to but two questions: 1, Whether there was negligence on the part of the railroad company in the running of the train at the time of the accident; and, 2, Whether, even if the company was negligent in this particular, the deceased was guilty of such contributory negligence as will defeat this action.

With respect to the first question, as here presented, the court charged the jury, substantially, that negligence on the part of either the railroad company or the deceased might be defined to be "the failure to do what reasonable and prudent persons would ordinarily have done, under the circumstances of the situation, or doing what reasonable and prudent persons, under the existing circumstances, would have done;" that the law did not require the railroad company to adopt and have in use, at public crossings, the most highly developed and best methods of saving the life of travelers on the highway, but only such as reasonable care and prudence would dictate, under the circumstances of the particular case; and that the question of negligence, or want of ordinary care and prudence, was one for the jury to decide. In this connection the court gave to the jury the following instruction, which it is claimed, was erroneous:

"You fix the standard for reasonable, prudent and cautious

men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard; and neither the judge who tries the case nor any other person can supply you with the criterion of judgment by any opinion he may have on that subject."

But it seems to us that the instruction was correct, as an abstract principle of law, and was also applicable to the facts brought out at the trial of the case. There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court. *New Jersey R. R. Co. v. Pollard*, 22 Wall. 341, 7 Am. Neg. Cas. 325; *Del., L. & W. R. Co. v. Converse*, 139 U. S. 469 (1); *Thompson v. Flint, etc., R'y Co.*, 57 Mich. 300; *Lake Shore & M. S. R'y Co. v. Miller*, 25 Mich. 274, 12 Am. Neg. Cas. 102, n.; *Detroit & Mil. R. R. Co. v. Van Steinberg*, 17 Mich. 99, 122, 12 Am. Neg. Cas. 116, n.; *Gaynor v. Old Colony & Newport R'y Co.*, 100 Mass. 208,

1. *Collision at crossing.* — In *DELAWARE, LACKAWANNA & WESTERN R. R. Co. v. CONVERSE*, 139 U. S. 469 (1891), collision of vehicle with part of train of cars running across grade crossing at night-time without signal or warning and only controlled by ordinary brakes, judgment for plaintiff for \$14,000 was affirmed, the court holding that the acts of the railroad company's servants in so running the cars constituted negligence rendering the company liable for injury to person driving across highway at crossing.

212, 9 Am. Neg. Cas. 439, n.; Marietta, etc., R. R. Co. v. Picksley, 24 Ohio St. 654, 12 Am. Neg. Cas. 424; Penn. R. R. Co. v. Ogier, 35 Pa. St. 60, 12 Am. Neg. Cas. 570, n.; Robinson v. Cone, 22 Vt. 213, 12 Am. Neg. Cas. 628; Jamison v. San Jose, etc., R. R. Co., 55 Cal. 593, 9 Am. Neg. Cas. 104, n.; Redfield on Railways (5th ed.), § 133, par. 2; 16 Am. & Eng. Enc. Law, Tit. "Negligence," 402, and authorities cited in note 2. We do not think, therefore, that this instruction was erroneous in any particular.

It is further urged that the court erred in giving to the jury the following instruction:

"If you find from the evidence in this case that the railroad train which killed Elijah Smith was moving at a rate of speed forbidden by the city ordinances, \* \* \* the law authorizes you to infer negligence on the part of the railroad company as one of the facts established by the proof."

It is said that no evidence was introduced with respect to an ordinance of the city regulating the speed of railway trains. Counsel, in this matter, labor under a misapprehension. The bill of exceptions states that "the ordinance of the city of Detroit prohibiting the running of railroad trains, within the limits of the city, at a greater rate of speed than six miles per hour," was admitted in evidence, over the defendant's objections. And as there was a great deal of evidence introduced on behalf of the plaintiff that the train, which killed Mr. Smith, was running at a much more rapid rate than the ordinance permitted, the instruction quoted was applicable, and, under the authorities, was as favorable to the defendant as it had the right to demand. Indeed, it has been held in many cases that the running of railroad trains within the limits of a city at a rate of speed greater than is allowed by an ordinance of such city, is negligence, *per se*. *Schlereth v. Missouri Pac. R'y Co.*, 96 Mo. 509; *Virginia Midland R'y Co. v. White*, 84 Va. 498, 12 Am. Neg. Cas. 634. But, perhaps, the better and more generally accepted rule is, that such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence. *Union Pac. R'y Co. v. Rassmussen*, 25 Neb. 810; *Blanchard v. Lake Shore & M. S. R'y Co.*, 126 Ill. 416, 11 Am. Neg. Cas. 434, n; *Meloy v. Chicago, etc., R'y Co.*, 77 Iowa, 743; *Savannah, etc., R'y Co. v. Flannagan*, 82 Ga.



579; *Peyton v. Tex. & Pac. R'y Co*, 41 La. Ann. 861. At any rate, the charge of the court, in this particular, was not unfavorable to the defendant, under the law. *Haas v. Chicago & N. W. R'y Co.*, 41 Wis. 44, 12 Am. Neg. Cas. 658, n.; *Vicksburg, etc., R. R. Co. v. McGowan*, 62 Miss. 682, 12 Am. Neg. Cas. 184, n.; *Phila., W. & B. R. R. Co. v. Stebbing*, 62 Md. 504, 12 Am. Neg. Cas. 9, n.; *McGrath v. N. Y. Central, etc., R. R. Co.*, 63 N. Y. 522, 12 Am. Neg. Cas. 396, n.; *Houston, etc., R. R. Co. v. Terry*, 42 Tex. 451; *Bowman v. Chicago, etc., R. R. Co.*, 85 Mo. 533; *Crowley v. Burlington, etc., R. R. Co.*, 65 Iowa, 658; *Keim v. Union R. & T. Co.*, 90 Mo. 314; *Ellis v. Lake Shore, etc., R. R. Co.*, 138 Pa. St. 506, 12 Am. Neg. Cas. 571; 4 Am. & Eng. Enc. Law, tit. "Crossings," 934, and authorities cited in notes 8 and 10.

One of the chief assignments of error, and, perhaps, the one most strongly relied on to obtain a reversal of the judgment below, is, that the court erred in giving the following instruction:

"So if you find that because of the special circumstances existing in this case, such as that this was a crossing in the city much used and necessarily presenting a point of danger, where several tracks run side by side, and there is consequent noise and confusion and increased danger; that owing to the near situation of houses, barns, fences, trees, bushes or other natural obstructions which afforded less than ordinary opportunity for observation of an approaching train, and other like circumstances of a special nature, it was reasonable that the railroad company should provide special safeguards to persons using the crossing in a prudent and cautious manner, the law authorizes you to infer negligence on its part for any failure to adopt such safeguards as would have given warning, although you have a statute in Michigan which undertakes by its provisions to secure such safeguards in the way the statute points out. The duty may exist outside the statute to provide flagmen or gates or other adequate warnings or appliances, if the situation of the crossings reasonably requires that — and of this you are to judge — and it depends upon the general rule that the company must use its privilege of crossing the streets on its surface grade with due and reasonable care for the rights of other persons using the highway with proper care and caution on their part.

"So, if you find that the train hands kept no proper lookout and managed the train without due caution and reasonable care,

you will be authorized to infer negligence on the part of the company as one of the facts established in the case."

That this instruction is in harmony with the general rule of law obtaining in most of the States, and at common law, we think there can be no doubt. The general rule is well stated in *Central Passenger R y Co. v. Kuhns*, 86 Ky. 578, 589, 11 Am. Neg. Cas. 626, n, as follows: "The doctrine with reference to injuries to those crossing the track of a railway, where the right to cross exists, is that the company must use such reasonable care and precaution as ordinary prudence would indicate. This vigilance and care must be greater at crossings in a populous town or city than at ordinary crossings in the country; so what is reasonable care and prudence must depend on the facts of each case. In a crossing within a city, or where the travel is great, reasonable care would require a flagman constantly at the crossing, or gates or bars, so as to prevent injury; but such care would not be required at a crossing in the country, where but few persons passed each day. The usual signal, such as ringing the bell and blowing the whistle, would be sufficient;" citing *Thompson on Neg.* 417; *Louis., Cin. & Lex. R. R. Co. v. Goetz*, 79 Ky. 442, 11 Am. Neg. Cas. 625, n. And it was accordingly held in that case that a railroad company which had failed to provide a flagman or gates, during the night-time when many trains were passing, at a crossing in a thickly populated portion of the city of Louisville, buildings being situated near the track at that point, was guilty of "negligence of the most flagrant character." See, also, to the same effect, *St. Louis, V. & T. H. R. R. Co. v. Dunn*, 78 Ill. 197, 11 Am. Neg. Cas. 431, n.; *Bentley v. Ga. Pac. R'y Co.*, 86 Ala. 484; *Western & Atlantic R. R. Co. v. Young*, 81 Ga. 397, 11 Am. Neg. Cas. 350, n.; *Troy v. Cape Fear, etc., R. R. Co.*, 99 N. C. 298, 12 Am. Neg. Cas. 410; *Bolinger v. St. Paul & Duluth R. R. Co.*, 36 Minn. 418, 12 Am. Neg. Cas. 141, n.

It is also held, in many of the States (in fact, the rule is well nigh, if not quite, universal), that a railroad company, under certain circumstances, will not be held free from negligence even though it may have complied literally with the terms of a statute prescribing certain signals to be given, and other precautions to be taken by it, for the safety of the traveling public at crossings. Thus in *Chicago, B. & Q. R. R. Co. v. Perkins*, 125 Ill. 127, 11 Am. Neg. Cas. 432, n., it was held that the fact that a statute

provides certain precautions will not relieve a railway company from adopting such other measures as public safety and common prudence dictate. And in *Thompson v. New York Central, etc., R. R. Co.*, 110 N. Y. 636, 12 Am. Neg. Cas. 363, n., it was held that the giving of signals required by law upon a railway train approaching a street crossing does not, under all circumstances, render the railway company free from negligence, especially where the evidence tends to show that the train was being run at an undue and highly dangerous rate of speed through a city or village. See, also, *Louis. & Nash. R. R. Co. v. Commonwealth*, 13 Bush (Ky.), 388, 11 Am. Neg. Cas. 625, n.; *Weber v. N. Y. Cent. R. R. Co.*, 58 N. Y. 451, 12 Am. Neg. Cas. 349, n. The reason for such rulings is found in the principle of the common law that every one must so conduct himself and use his own property as that, under ordinary circumstances, he will not injure another, in any way. As a general rule, it may be said that whether ordinary care or reasonable prudence require a railroad company to keep a flagman stationed at a crossing that is especially dangerous, is a question of fact for a jury to determine, under all the circumstances of the case, and that the omission to station a flagman at a dangerous crossing may be taken into account as evidence of negligence; although in some cases it has been held that it is a question of law for the court. It seems, however, that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous; as, for instance, that it is in a thickly populated portion of a town or city; or, that the view of the track is obstructed either by the company itself or by other objects proper in themselves; or, that the crossing is a much traveled one, and the noise of approaching trains is rendered indistinct, and the ordinary signals difficult to be heard, by reason of bustle and confusion incident to railway or other business; or, by reason of some such like cause; and that a jury would not be warranted in saying that a railroad company should maintain those extra precautions at ordinary crossings in the country. The following cases are illustrative of various phases of the rules we have just stated: *Eaton v. Fitchburg R. R. Co.*, 129 Mass. 364, 12 Am. Neg. Cas. 76, n.; *Bailey v. New Haven R. R. Co.*, 107 Mass. 496; *Penn. R. R. Co. v. Matthews*, 36 N. J. Law, 531, 12 Am. Neg. Cas. 292; *Penn. R. R.*

Co. v. Killips, 88 Pa. St. 405; Kansas Pac. R'y Co. v. Richardson, 25 Kan. 391, 11 Am. Neg. Cas. 570, n.; State v. Phila., W. & B. R. R. Co., 47 Md. 76, 12 Am. Neg. Cas. 8, n.; Welsch v. Hannibal, etc., R. R. Co., 72 Mo. 451, 12 Am. Neg. Cas. 194, n., Frick v. St. Louis, etc., R. R. Co., 75 Mo. 595; Pittsburgh, etc., R'y Co. v. Yundt, 78 Ind. 373, 11 Am. Neg. Cas. 507, n.; Hart v. Chicago, R. I. & P. R'y Co., 56 Iowa, 166, 11 Am. Neg. Cas. 533; Kinney v. Crocker, 18 Wis. 74.

But it is insisted that these rules are none of them applicable to this case, because the whole subject of signals and flagmen, gates, etc., at crossings in Michigan is regulated by statute. The claim is put forth that, under the statute of Michigan (3 How. Stat., § 3301), an officer of the State, known as the railroad commissioner, is charged with the duty of determining the necessity of a flagman at any and all crossings in the State, and that, unless an order had been made by him requiring a railroad company to station a flagman at any particular crossing, the failure on the part of the company to provide such flagmen could not even be considered as evidence of negligence; and that in this case no such order by the commissioner is shown to have been made. *Battishill v. Humphreys*, 64 Mich. 494, 12 Am. Neg. Cas. 105, 130; *Guggenheim v. Lake Shore & M. S. R'y Co.*, 66 Mich. 150, 12 Am. Neg. Cas. 103, n; and *Freeman v. Duluth, S. S. & A. R'y Co.*, 74 Mich. 86, 12 Am. Neg. Cas. 105, n., are relied on as sustaining this contention.

If the construction of this statute by the Michigan courts be as claimed by the defendant, of course this court would feel constrained to adopt the same construction, even if we thought it in conflict with fundamental principles of the law of negligence, to which we have referred in a preceding part of this opinion, obtaining in other States. *Meister v. Moore*, 96 U. S. 76; *Bowditch v. Boston*, 101 U. S. 16; *Flash v. Conn*, 109 U. S. 371; *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555; *Detroit v. Osborne*, 135 U. S. 492.

But do the Michigan cases cited sustain the defendant's contention? We think not; but rather that they support the rule laid down by the court below in the charge excepted to. In *Battishill v. Humphreys*, 64 Mich. 494, 12 Am. Neg. Cas. 105, 130, the court below had refused to instruct the jury, upon a request by the plaintiff in error, that "the railroad law of this State (art. 4, § 3) lays upon the railroad commissioner of the State the duty

of determining the necessity of establishing a flagman upon any particular street crossing of a railway; and upon the testimony and under the pleadings in this case, the absence of a flagman at Summit avenue is no evidence of any negligence upon the part of the receivers."

Such refusal having been assigned as error, the Supreme Court of the State held that the instruction should have been given, and accordingly reversed the judgment below. In the opinion the court said:

"I think the second request of the defendants should have been given. No reference was made to this matter in the charge of the court; and it may well be considered, when a request is specially made, and it is refused, that the jury will take such refusal as a liberty to infer that the request is wrong in law, unless some explanation is made by the court for the reasons for such refusal to rebut such natural inference. \* \* \* Evidence of this nature was introduced, and the request which ought to have been given denied, and we cannot say it did not have some influence upon the jury in determining the question of the negligence of the company."

If this decision stood alone there would be much force in the contention of the defendant in this case; but the other decisions referred to have explained it, and apparently qualified the broad doctrine laid down in it, bringing the rule in Michigan in harmony with the generally accepted rule obtaining elsewhere.

Thus in *Guggenheim v. Lake Shore & M. S. R'y Co.*, 66 Mich. 150, 12 Am. Neg. Cas. 103, n., although it was stated in the opinion that "the railroad company is not compelled to keep a watchman or flagman at every street or road crossing where a jury, upon a trial like this, might think it necessary to have one stationed;" and that "this matter is regulated under the statutes of our State by the railroad commissioner," yet it was held that when the company itself so obstructs its tracks that its trains cannot be seen by travelers approaching a crossing, or so that the ordinary signals required by statute will not be sufficient to warn travelers of the approach of trains, "some additional warning must be given, and there are cases where a flagman would be necessary to acquit the company of negligence." And it was further held that the trial court was right in instructing the jury that it was the duty of the company to give to the traveler on the highway due and timely warning of the coming of its trains and the

approaching danger "either by bell or whistle, or both, or by some other means, and in such a way as to give him an opportunity, by the exercise of due diligence and care, to meet and guard himself from danger;" thus showing that a duty on the part of the railway company to provide against accidents at crossings may and does exist outside of the statute.

But the case of *Freeman v. Duluth, S. S. & A. R'y Co.*, 74 Mich. 86, 12 Am. Neg. Cas. 105, n., which, so far as we have examined, is the latest adjudication of the Supreme Court of Michigan on the subject, contains the most thorough discussion of the general question of any of those referred to by the defendant; and, so far from sustaining its contention, is directly opposed to it and in line with the instruction given by the court below in this case. In that case one of the questions considered by the court was, whether it was negligence on the part of the railway in not providing a flagman at the crossing of Genesee street in the city of Marquette, the railroad commissioner not having required it to station one there. The facts in relation to the hazardous nature of the crossing are referred to particularly in the opinion of the court from which we quote. In considering the question the court went very fully into the merits of it, in all its bearings, and said: "The contention of the defendant is that it was not negligence. It is claimed that under the statutes of this State, the duty of determining where flagmen shall be stationed devolves upon the railroad commissioner; and that in order to hold defendant liable for such negligence in this case, it should have appeared in proof that the railroad commissioner had ordered a flagman to be stationed at this crossing, and that his orders were not obeyed; or that the crossing was such an exceptionally dangerous one that a common-law duty was imposed on the defendant to keep a flagman at that point; and that no showing of this kind was made."

Replying to this contention, the court said: "We think the judge below ruled correctly on this point and in accordance with our previous decisions. The jury were instructed, substantially, that it is not the law of this State that at every road or street crossing in a village or city, a railroad company is bound to place a flagman. The law puts upon the railroad commissioner the duty of determining the necessity of establishing a flagman upon any particular street crossing of a railroad, and the absence of a flagman at Genesee street crossing, where the accident occurred, is of itself no evidence of negligence upon the part of the defendant,

And the plaintiff must show that the circumstances of the crossing are such that common prudence would dictate that the railroad company should place a flagman there, or his equivalent. That before the jury could find this it must be made to appear to them that the danger at the crossing was altogether exceptional — that there was something about the case rendering ordinary care on the part of the witness Grant (the driver of the carriage, which was run over and broken up at the crossing), an insufficient protection against injury, and, therefore, made the assumption of the burden of a flagman on the part of the railroad company, a matter of common duty for the safety of people crossing. 'You have, as I said before, been at this crossing. You have seen the situation. You have seen its relation to travel and to the city, and it is for you to determine, if you reach that point, under all the circumstances of the case, whether or not it was negligence, under the instructions I have given you and the evidence, not to have a flagman there.' "

The Supreme Court then went on to say: "If any fault can be found with this charge, it was too favorable to the defendant, in that it connected the necessity of keeping a flagman at the crossing with the use of ordinary care on the part of Grant. The duty of retaining a flagman at this point did not depend on the question whether Grant, in this particular instance, could by common prudence have avoided this collision or not. It depended rather upon the situation of the crossing, its relation to the travel upon the street generally, and the facilities afforded, not only to the travelers on the street, but the trainmen on the cars, to avoid collisions and accidents of this kind, without a flagman to give warning of approaching trains.

"I think the jury were warranted in finding it to be negligence in the defendant in not providing a watchman at this point. It seems that to the south from Genesee street there was a steep up grade, so that a train of loaded cars must, in order to ascend the same, cross the street at a higher rate of speed than would, considering the situation of the crossing, be prudent to the safety of passers on the street, without warning of the train's approach. A train coming from the north could not be seen at all by those traveling on the street in the direction Grant was driving, until the traveler was within forty feet of the track, and the train within from 150 to 175 feet of the center of the street. And the engineer on the train, being lower down in his cab than a man in

a buggy, could not get his eye into Genesee street west of the track, as was the fact in this case, until the locomotive was within sixty or seventy-five feet from the crossing, and then his vision would only extend forty or fifty feet west of the track on the street. Under such circumstances, a train ought to run over this crossing so that it could be stopped at once, or a flagman ought to be stationed where he could give warning of its approach. When an engineer, at a distance beyond seventy-five feet from the crossing of a street in a city like Marquette, cannot see into the street except the straight line thereof where the track crosses, and the traveler cannot see even the top of the locomotive, until he gets within forty feet of the track, something more than ordinary pains to prevent accidents is incumbent both on the railroad company and also on the traveler, if such traveler is acquainted with the situation.

"In *Battishill v. Humphreys*, 64 Mich. 494, 12 Am. Neg. Cas. 105, 130, we held, under the pleadings and testimony in the case, that the absence of a flagman at Summit avenue crossing, in Detroit, could not be considered negligence in the railroad company, as the railroad commissioner had not determined that it was necessary to maintain one there. *But nothing was said or intended to be said, in that opinion, that there could be no negligence, in any case, in not maintaining a flagman at a street crossing, unless such commissioner had ordered one to be stationed there.* In *Guggenheim v. L. S. & M. S. R'y Co.*, 66 Mich. 150, 12 Am. Neg. Cas. 103, n., the law in this respect is laid down substantially as the circuit judge in this case instructed the jury."

We have quoted extensively from the opinion in the case last referred to because it seems to us a complete refutation of the contention of the defendant herein, and states the law, on this point, substantially as the court below did in its charge to the jury in this case, and because, also, the facts and circumstances relative to the railroad crossing there were so very similar to those in this case, that it makes it a very strong authority in support of the judgment below. The underlying principle in all cases of this kind which requires a railroad company, not only to comply with all statutory requirements in the matter of signals, flagmen and other warnings of danger at public crossings, but many times to do much more than is required by positive enactment, is, that neither the legislature nor railroad commissioners can arbitrarily determine in advance what shall constitute ordinary care or



reasonable prudence in a railroad company, at a crossing, in every particular case which may afterwards arise. For, as already stated, each case must stand upon its own merits and be decided upon its own facts and circumstances; and these are the features which make the question of negligence primarily one for the jury to determine, under proper instructions from the court. We think, therefore, that, in that portion of the charge which we have been discussing, the court below committed no error to the prejudice of the defendant.

But it is claimed that the last paragraph of that portion of the charge last above quoted, referring to the question whether or not the trainmen kept a proper lookout and managed the train in a prudent and cautious manner, was erroneous, because, so it is claimed, "there was no evidence that the train hands kept no proper lookout, etc." This contention is also without merit. There was evidence that the ordinary signals of blowing the whistle and ringing the bell at the crossing were not given, and that the train was running at a more rapid rate than was permitted by the city ordinance. If the jury believed that evidence they must necessarily have found that the trainmen did not keep a proper lookout, and did not manage the train in a prudent and careful manner. The instruction complained of was certainly not prejudicial to the defendant in this particular, since it referred to matters concerning which evidence had been admitted, and was correct on principle. The most that can be said against it is that the substance of it had perhaps been given in another portion of the charge, and the court below need not have given it; but the giving it in different language, while not necessary, and while also correct practice might require that it be not given, was not reversible error. So far, then, as the instructions of the court below, upon the first question, as above arranged, are concerned, we conclude there was no error prejudicial to the defendant. And this leads to a consideration of the question of the alleged contributory negligence on the part of the deceased.

It is earnestly insisted that, although the defendant may have been guilty of negligence in the management of its train, which caused the accident, yet the evidence in the case given by the plaintiff's own witnesses, shows that the deceased himself was so negligent in the premises that but for such contributory negligence on his part, the accident would not have happened; and it is therefore contended that the court below should, as matter

of law, have determined, and it not having done so, this court should so declare, and reverse its judgment. To this argument several answers might be given, but the main reason why it is unsound is this: As the question of negligence on the part of the defendant was one of fact for the jury to determine, under all the circumstances of the case, and under proper instructions from the court, so also the question of whether there was negligence in the deceased which was the proximate cause of the injury, was likewise a question of fact for the jury to determine under like rules. The determination of what was such contributory negligence on the part of the deceased as would defeat this action, or, perhaps, more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person, under similar circumstances, was no more a question of law for the court than was the question of negligence on the part of the defendant. There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other. This rule is sustained by the Michigan authorities (*Mynning v. Detroit, L. & N. R. R. Co.*, 64 Mich. 93, 12 Am. Neg. Cas. 116, n.; *Underhill v. Chicago, etc., R'y Co.*, 81 Mich. 43; *Baker v. R. R. Co.*, 68 Mich. 90; *Engel v. Smith*, 82 Mich. 1); and its correctness is apparent from an examination and analysis of the generally accepted definitions of contributory negligence as laid down by the courts and by text writers. Without going into a discussion of these definitions or even attempting to collate them, it will be sufficient for present purposes to say that the generally accepted and most reasonable rule of law applicable to actions in which the defense is contributory negligence may be thus stated: Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years (having been first enunciated in *Davies v. Mann*, 10 M. & W. 546), that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the

injured party's negligence (1). *Inland & Seaboard Coasting Co.*

1. In *Davies v. Mann*, 10 M. & W. 546, an action for killing an ass, which the declaration alleged to have been lawfully upon the highway when it met its death, it appeared that the animal, fettered by the fore feet, had been placed on the highway by the plaintiff, and was killed by being unable to get away from the defendant's wagon, which, without its driver, was coming at a smartish pace along the road. *Held*, that the jury were properly directed that, although it was an illegal act on the part of the plaintiff to put the animal on the highway, still, unless its being there was the immediate cause of the accident, the plaintiff was entitled to recover. It was also held that the general rule of law respecting negligence is, that although there may have been negligence on the part of the plaintiff, yet, unless he could, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he is entitled to recover.

*The Rule in Davies v. Mann.* Commenting on the celebrated "Donkey case," the leading English case on the principle set forth in the *Ives* case (the case at bar), *Shearman & Redfield*, in their work on the Law of Negligence (5th ed.), § 99, say that the rule in *Davies v. Mann*, has been accepted by every court in England including the House of Lords [citing authorities]; by the United States Supreme Court and by every court in the Union [citing authorities], except possibly Pennsylvania.

The rule in *Davies v. Mann*, 10 M. & W. 546, is applied and followed in numerous negligence cases reported in the series of American Negligence Cases and American Negligence Reports, among which are the following:

*Bigelow v. Reed*, 51 Me. 325, 1 Am. Neg. Cas. 289, 294 (action for injury caused by a runaway horse, where it

was held that a plaintiff is not precluded from recovering for an injury negligently done by the defendant by the fact that he himself has been guilty of unlawful or negligent conduct, unless he might, by the exercise of ordinary care at the time, have avoided the injury, illustrating, among other cases, the principle in *Davies v. Mann*); *Lucas v. New Bedford & Taunton R. R. Co.*, 72 Mass. (6 Gray) 64, 3 Am. Neg. Cas. 735, 741 (person alighting from moving train); *Balt. & Pot. R. R. Co. v. Jones*, 95 U. S. 439, 7 Am. Neg. Cas. 340, 343 (employee injured while riding on locomotive); *Penn. R. R. Co. v. Reed*, 60 Fed. Rep. (C. C. A.) 694, 7 Am. Neg. Cas. 383, 385 (passenger boarding train with incumbrances injured while being assisted by a trainman); *Dun v. Seaboard & Roanoke R. R. Co.*, 78 Va. 645, 10 Am. Neg. Cas. 354, 359 (passenger's arm, which was protruding out of car window, struck by object near track, as train was in rapid motion); *Carrico v. West Va., Central & Pac. R'y Co.*, 35 W. Va. 389, 10 Am. Neg. Cas. 420, 428 (passenger's arm resting on window sill of car, but not protruding therefrom); *Fisher v. West Va. & Pitts. R. R. Co.*, 39 W. Va. 366, 10 Am. Neg. Cas. 440, 456 (intoxicated person riding on and falling from platform of car); *Orr v. Cedar Rapids & Marion City R'y Co.*, 94 Iowa, 433, 11 Am. Neg. Cas. 513, 514 (collision between vehicle and street car); *Krenzer v. Pitts., Cin., Chicago & St. L. R'y Co.*, 151 Ind. 587, 5 Am. Neg. Rep. 137, 138 (boy, sitting upon railroad track, falling asleep and hurt by passing train); *Herrick v. Wixon*, (Michigan, 1899), 6 Am. Neg. Rep. 576, 579 (explosion of firecracker in circus tent and one of the audience in the tent injured); *Bolin v. Chicago, St. Paul, M. & O. R'y Co.*, (Wisconsin, 1900), 9 Am. Neg. Rep. 209, 213 (trespasser killed by jumping from train);

*v. Tolson*, 139 U. S. 551, 558, and cases cited (1); *Donohue v. St. Louis, etc., R. R. Co.*, 91 Mo. 357; *Vicksburg & Jackson R. R. Co. v. Patton*, 31 Miss. 156, 12 Am. Neg. Cas. 187, n.; *Deans v. Wilmington & W. R. R. Co.*, 107 N. C. 686, 12 Am. Neg. Cas. 401; 2 *Thompson on Neg.* 1157; *Cooley on Torts* (1st Ed.), 675; 4 Am. & Eng. Enc. Law, tit. "Contributory Negligence," 30, and authorities cited in note 1.

With respect to the question of the alleged contributory negligence of the deceased, the court charged the jury as follows:

"Turning now to the conduct of Smith, and subjecting that to the same test of reasonable prudence and cautious conduct of a person in his situation, you will understand that, no matter how negligently the company ran this train, or how unreasonably they neglected to provide sufficient safeguards at the crossing, if he brought his death upon himself by his own negligence, his administrator is not entitled to a verdict in this suit.

"So if you find that he was familiar with this crossing and its dangers, one and all of them; that he frequently used it and knew how to act in using it to protect himself; and that, under the special circumstances which you find, he failed to act as a prudent and cautious man should have acted from beginning to end, or that he omitted some precaution that a prudent man ought to have taken, whereby he lost his life, the plaintiff cannot recover. He should use all his faculties of seeing and hearing; he should approach cautiously and carefully; should look and listen and do everything that a reasonably prudent man would do before he attempted to make the crossing. Scrutinize his actings and doings under the light of the then situation; the nature and character of the crossing; the fact of the difficulty of observation; the time of day and the probability of danger from passing trains; the fact that there were other railroads side by side; that another

*Prieur v. E. H. Stafford Co.*, (Michigan, 1901) 9 Am. Neg. Rep. 509, 573 (collision between vehicles); *Costello v.*

*Third Av. R. R. Co.*, 161 N. Y. 317, 10 Am. Neg. Rep. 574 (note on contributory negligence in crossing-accident cases); *Nieboer v. Detroit Electric R'y*, (Michigan, 1901), 10 Am. Neg. Rep. 609, 615 (passenger injured while riding on bumper of crowded street car). See, also, TABLE OF CASES CITED in vol. 12 AM. NEG. CAS., in which volume the case of *Davies v. Mann* is frequently cited.

1. *INLAND & SEABOARD COASTING Co. v. Tolson*, 139 U. S. 551 (1891), was an action for personal injuries sustained by plaintiff, a wharfinger, whose foot was crushed by violent striking of steamboat against wharf, which boat was approaching to take freight from plaintiff; judgment for plaintiff for \$8,000 affirmed.

train on one of these was actually approaching and passing; the noise and confusion; possibly the noise and confusion of signals; and every fact and circumstance bearing on the case to influence his conduct then and there, under those circumstances, and not any other circumstances; and say, upon your fair and impartial judgment, whether he acted as a reasonable and prudent man should have acted and with the due care and caution demanded by the exigencies of the occasion.

"If he did so act, and the railroad company was negligent, his administrator is entitled to your verdict. If he did not so act, the railroad company is entitled to your verdict, whether it was negligent or not. If it was not negligent, it is entitled to your verdict, no matter how Smith acted." These instructions are so full and complete, and are in such entire accord with the rules of law applicable to cases of this character, that no fault whatever can be found with them. They embody, substantially, the entire law of the case, on the questions under consideration, and were applicable to every feature of it. Indeed, if they are open to any criticism at all it is that they were more favorable to the defendant than it had the right to demand, under the rules above stated, since they enabled the defendant to be relieved from any liability in the case, if the deceased had been guilty of contributory negligence, even though it might, by the exercise of ordinary care and prudence, have averted the results of such negligence. Mr. Pierce, in his work on Railroads, p. 343, after a review of the authorities on the subject, lays down substantially the same general rule as to the care required of travelers at railway crossings in the following terms: "A traveler upon a highway, when approaching a railroad crossing, ought to make a vigilant use of his senses of sight and hearing, in order to avoid a collision. This precaution is dictated by common prudence. He should listen for signals, and look in the different directions from which a train may come. If, by neglect of this duty, he suffers injury from a passing train, he cannot recover of the company, although it may itself be chargeable with negligence, or have failed to give the signals required by statute, or be running at the time at a speed exceeding the legal rate." See, also, generally, upon this question, 4 Am. & Eng. Enc. Law, 68-78, and authorities cited in the notes.

The recent case of *Sullivan v. New York, N. H. & H. R. R. Co.*, from Massachusetts, which, in advance of the official reports,

is published in 28 N. E. Rep. 911, is so similar to the one at bar on this question, that it deserves more than a passing notice. [See this case reported in 12 Am. Neg. Cas. 70, *ante*, 154 Mass. 524.] The substance of the case is stated in the syllabus by the reporter as follows: "Plaintiff, a woman about sixty five years of age, of ordinary intelligence, and possessed of good sight and hearing, was injured at a railroad crossing. The railroad had been raised several feet higher than the sidewalk, and the work of grading was still unfinished, and the crossing in a broken condition. There were three tracks, and a train was approaching on the middle one. The view was obstructed somewhat with buildings, but after reaching the first track it was clear. The evidence showed that the plaintiff was familiar with the passing of trains; that she did not look before going upon the track; and that, if she had looked, she could have seen the train a quarter of a mile. When the whistle sounded she looked directly at the train and hurried to get across. Plaintiff testified that she looked before going upon the track, but did not see the train or hear the whistle; that the only warning she had was the noise of its approach, after she was on the first track; and that she did not then look to see where it was, or on which track it was coming, but started to cross as fast as possible, and in so doing stumbled and fell between the rails. The signals required by the statutes were not given. Held, that it did not appear as matter of law that plaintiff was guilty of gross or wilful negligence, and that it was proper to submit the question to the jury."

See, also, *Evans v. Lake Shore & M. S. R'y Co.*, 88 Mich. 442, 50 N. W. Rep. 386, 12 Am. Neg. Cas. 109, n.; *Ellis v. Lake Shore & M. S. R'y Co.*, 138 Pa. St. 506, 12 Am. Neg. Cas. 571, n.; *Brown v. Tex. & Pac. R'y Co.*, 42 La. Ann. 350; *Heddles v. Chicago & N. W. R'y Co.*, 77 Wis. 228, 12 Am. Neg. Cas. 658, n.; *Parsons v. N. Y. Cent., etc., R. R. Co.*, 113 N. Y. 355, 9 Am. Neg. Cas. 606, n.; *Cooper v. Lake Shore & M. S. R'y Co.*, 66 Mich. 261, 12 Am. Neg. Cas. 130, n.

Nothing was said by this court in *Chicago, R. I. & P. R. R. Co. v. Houston*, 95 U. S. 697, 7 Am. Neg. Cas. 345, or in *Schofield v. Chicago, Milw. & St. Paul R'y Co.*, 114 U. S. 615 (1),

1. *Collision at crossing.* — In *Schofield v. Chicago, Milwaukee & St. Paul R'y Co.*, 114 U. S. 615 (1885), collision between train and sleigh at crossing, judgment directed for defendant was affirmed. the Supreme Court (per Mr. Justice Blatchford), after stating the facts, saying: "The ground upon

which are relied upon by the defendant, that in anywise conflicts with the instructions of the court below in this case, or lays down any different doctrine with respect to contributory negligence. *Delaware R. R. Co. v. Converse*, 139 U. S. 469 (1). Nor do the Michigan authorities, which are relied upon, when read in the light of the particular facts and circumstances of each separate case, enunciate a different doctrine, but so far as applicable, they tend to sustain the instructions objected to.

It is also insisted that the court erred in refusing the following request of the defendant for instructions:

"If you find that the deceased might have stopped at a point fifteen or eighteen feet from the railroad crossing, and there had an unobstructed view of defendant's track either way; that he failed so to stop; that instead the deceased drove upon the defendant's track, watching the Bay City train that had already passed, and with his back turned in the direction of the approaching

which the Circuit Court directed a verdict for the defendant (2 McCrary, 268), was that the plaintiff, by his own showing, was guilty of contributory negligence, whatever negligence there may have been on the part of the defendant. Applying the test, that if it would be the duty of the court, on the plaintiff's evidence, to set aside, as contrary to the evidence, a verdict for the defendant, if given, the court had authority to direct a verdict for the defendant, it considered the case under the rules laid down in *Continental Improvement Co. v. Stead*, 95 U. S. 160, and, especially in *Chicago, Rock Island & Pacific R. R. Co. v. Houston*, 95 U. S. 697, 7 Am. Neg. Cas. 345, and arrived at the conclusions of law, that neither the fact that the train was not a regular one, nor the fact of its high rate of speed, excused the plaintiff from the duty of looking out for a train; that the fact that it did not stop at the depot could avail the plaintiff only on the view that, hearing a whistle from it as it was south of the depot, he supposed it would stop there, and so failed to look, but that, in such case, he would have been negligent, because it

was not certain the train would stop at the depot, and he would have had warning that a train was approaching; that the neglect of the train to blow a whistle or ring a bell between the depot and the crossing did not relieve the plaintiff from the duty of looking back, at least as far as the depot, before going on the track; and that, in view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision, and of the fact that he was at least 100 feet from the crossing when the train passed the depot, and could have seen it if he had looked, and have avoided the accident by stopping until it had passed by, he was negligent in not looking. These conclusions of law approve themselves to our judgment, and are in accordance with the rules laid down in the cases referred to." (Citing and quoting with approval, *Chicago, Rock Island & Pacific R. R. Co. v. Houston*, 95 U. S. 697, 7 Am. Neg. Cas. 345).

1. See note of the *CONVERSE* case, on page 668, *ante*.

train, the deceased was guilty of contributing to the injury, and your verdict must be for the defendant although you are also satisfied that the defendant was guilty of negligence in the running of the train in the particulars mentioned in the declaration."

The reason given by the court for refusing this request was that "it is too much upon the weight of the evidence and confines the jury to the particular circumstance narrated without notice of others that they may think important." This reason is a sound one. In determining whether the deceased was guilty of contributory negligence the jury were bound to consider *all* the facts and circumstances bearing upon that question, and not select one particular prominent fact or circumstance, as controlling the case to the exclusion of all the others. *Cooper v. Lake Shore & Mich. South. R'y Co.*, 66 Mich. 261; *Balt. & Ohio R. R. Co. v. Kane*, 69 Md. 11, 3 Am. Neg. Cas. 689. Moreover, the substance of the request, so far as it was correct, had already been given, in general terms, by the court, in that part of the charge referring to the degree of care and caution required of the deceased in approaching the railroad crossing, in order to free him from the charge of contributory negligence; and the refusal of the court to give it again, in different language, was not error. *N. Y., Lake Erie & Western R. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 75, 8 Am. Neg. Cas. 690.

There are no other questions in the case that call for special consideration. We have endeavored to consider and pass upon all of the material ones that have been discussed by counsel, both in their brief and in oral argument at the bar. We do not think that it has been shown that any error was committed in the trial below which was prejudicial to the rights of the defendant.

Judgment affirmed.

CHILD RUN OVER BY HORSE CAR — DEGREE OF CARE REQUIRED OF CHILDREN OF TENDER YEARS. — In *RAILROAD COMPANY v. GLADMON*, 15 Wall. (U. S.) 401 (1872), an action for injuries to plaintiff, a child seven years old, who was run over by a horse car operated by one of the drivers of the Washington and Georgetown R'y Co., judgment for plaintiff for \$9,000 was affirmed. The errors assigned were to the instructions of the trial court as to degree of care required of adults and children, and as to duties and obligations of travelers and street-car companies. The Supreme Court held that "the rule of law in regard to the negligence of an adult, and the rule in regard to that of an infant of



tender years, is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years, less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age, less caution would be required than of one of seven, and of a child of seven, less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case." \* \* \*

*Child run over by train.*

See *HAYES v. MICHIGAN CENTRAL R. R. CO.*, 111 U. S. 228 (1884), boy, deaf and dumb, between eight and nine years of age, run over by train; judgment on verdict directed for defendant reversed, it being held that the case was for the jury.

**COLLISION BETWEEN TRAINS — PASSENGER INJURED — GROSS NEGLIGENCE—INSTRUCTIONS.**—In *MILWAUKEE & ST. PAUL R'Y CO. v. ARMS*, 91 U. S. 489 (1875), collision between trains in which a passenger was injured, judgment for plaintiff for \$4,000 was reversed for erroneous instructions on "*gross negligence*," and the jury should not have awarded exemplary damages unless the injury sustained was due to wilful misconduct on part of railway employees, compensatory damages for the injury actually inflicted being all that the injured party was entitled to recover. Mr. Justice Davis, in delivering the opinion of the court, said: "'*Gross negligence*' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term '*ordinary negligence*;' but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employees of the company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train; and the court, therefore, misdirected the jury."

**COLLISION BETWEEN TRAIN AND WAGON AT CROSSING — DUTY OF TRAVELERS AND RAILROAD COMPANIES AT CROSSING.** — In **CONTINENTAL IMPROVEMENT CO. v. STEAD**, 95 U. S. 161 (1877), collision between train and wagon at crossing, judgment for plaintiff was affirmed, it being held that the instructions of the trial judge with regard to the rights and duties of parties at crossings correctly stated the law. MR. JUSTICE BRADLEY, in delivering the opinion of the court, said: "We think the judge was perfectly right, therefore, in holding that the obligations, rights, and duties of railroads and travelers upon intersecting high-ways are mutual and reciprocal, and that no greater degree of care is required of the one than of the other. For, conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise, under the circumstances of the case, in endeavoring fairly to perform his duty. The charge of the court was in substantial accordance with these views."

*Collisions and crossings.*

Among other "Collision and Crossing cases" decided in the *United States Supreme Court*, are the following:

*Injured while unloading car — Collision.*

In **TEXAS & PACIFIC R'Y CO. v. VOLK**, 151 U. S. 73 (1893), where plaintiff, while unloading a car on defendant's side track, was injured by being thrown off the car by an engine and car colliding with it, judgment for plaintiff was affirmed, with interest, and ten per cent damages.

*Person riding in wagon injured in collision at crossing.*

In **BALTIMORE & OHIO R. R. CO. v. GRIFFITH**, 159 U. S. 603 (1895), collision between train and vehicle in which plaintiff was riding at crossing, judgment for plaintiff for \$5,000 was affirmed, following and reaffirming *Continental Improvement Co. v. Stead*, 95 U. S. 161. (The **GRIFFITH** case affirmed the decision in 44 Fed. Rep. 574.)

*Collision between wagon and train at crossing.*

IN RIO GRANDE WESTERN R'Y CO. *v.* LEAK, 163 U. S. 280 (1896), collision between train and wagon at crossing, in which plaintiff sustained severe injuries to his person, one of his legs having to be amputated, and in addition his horses were killed and wagon destroyed in the collision, judgment for plaintiff for \$13,370 was affirmed.

*Walking along track and struck by train.*

IN TEXAS & PACIFIC R'Y CO. *v.* CODY, 166 U. S. 606 (1897), person walking along track struck by train, judgment in the Circuit Court of Appeals for Fifth Circuit (30 U. S. App. 183), affirming judgment for plaintiff below for \$7,500 was affirmed.

CHILD RUN OVER BY ENGINE — DEGREE OF CARE REQUIRED OF ENGINEER — DAMAGES — ERRONEOUS INSTRUCTIONS. — In CHICAGO, ROCK ISLAND & PACIFIC R'Y CO. *v.* CAULFIELD (*U. S. Circuit Court of Appeals, Eighth Circuit, September, 1894*), 27 U. S. App. 358, an action for damages for injuries sustained by plaintiff, a boy between eight and nine years old, who was run over by a switching engine, judgment for plaintiff was reversed for erroneous instructions as to degree of care required of engineer, and also permitting jury to assess damages for mental suffering as well as physical pain. The facts, as stated in the opinion by THAYER, CIRCUIT JUDGE, are as follows:

"This is a suit for personal injuries which originated in the city of St. Joseph, Missouri. The action was brought by John J. Caulfield, the defendant in error, by his next friend, Michael J. Caulfield, against the Chicago, Rock Island and Pacific Railway, the plaintiff in error, in the Circuit Court for Buchanan county, State of Missouri, from whence it was removed to the Circuit Court of the United States for the Western District of Missouri. It was tried in the latter court, and resulted in a verdict and judgment against the railway company. The errors that have been assigned relate to the instructions that were given by the trial court. A brief statement of the circumstances under which the injuries were sustained is essential to a correct understanding of the questions that we have to determine.

"The accident occurred in a railroad yard in the city of St. Joseph, which appears to have been used in common by several railroad companies, about six o'clock in the evening of the 29th day of May, 1890. At that hour one of the defendant company's engineers, who had charge of a switching engine, was taking the engine to the

roundhouse at the conclusion of the day's labor. At a certain point on the way to the roundhouse, where there were three tracks belonging to as many different railroads which were laid side by side, was a footpath across these tracks which was used by many people, especially in the morning and in the evening when they were going to or returning from their places of work. Where this path led across the tracks, John J. Caulfield, the plaintiff, who was a boy between eight and nine years old, was run over by the switching engine in question and was severely injured. Some distance to the north of the point where the accident occurred the track on which the switching engine was moving on its way to the roundhouse was crossed obliquely by three other railroad tracks, and before going over that crossing, just prior to the accident, the switching engine stopped and whistled, as it was its duty to do, and then moved south over the crossing to the place where the plaintiff was run over and injured.

"The engineer, with respect to his own conduct on that occasion, gave evidence tending to show that when he reached the aforesaid railroad crossing and stopped to whistle he saw a boy standing about three and one-half rail lengths south of the above-mentioned footpath; that the boy was standing at the time on the end of one of the ties of the Rock Island road so near to the rail that he would be struck by the engine; that he kept his eye on the boy and rang the engine bell, but that he seemed to pay no attention to the warning, whereupon an alarm whistle was sounded; that the boy then turned around and looked at the engineer, who motioned to him with one hand, and that he then stepped off from the tie and to a sufficient distance from the track to allow the engine to pass in safety; that he then started his engine forward, going at the rate of from three to four miles per hour, and that when he came within ten or twelve feet of the boy the latter started to run across the track immediately in front of the engine, whereupon the engineer, according to his statement, reversed his engine, put on the vacuum brake, and stopped as soon as possible, but not in time to avoid the injury.

"On the other hand, there was evidence in behalf of the plaintiff below which tended to show that the switching engine was running at the rate of from five to eight miles per hour, and that, as it moved south over the railroad crossing above mentioned, and until it reached the footpath where the boy was hurt, the engineer in charge of the same was looking west at an excursion train moving north on an adjoining track and was not looking down the track in the direction in which the switching engine was moving, and that he did not give any proper signal to warn people who might be on

the footpath of impending danger. The evidence for the plaintiff further tended to show that at the same time the boy was standing in the center of the Rock Island track immediately in front of the approaching switch engine, and that he also was looking west in the direction of the excursion train, and was apparently unaware of the approach of the switching engine until it was too late to get off the track. It will thus be seen that the evidence was conflicting, and that the case made by the plaintiff differed essentially from the case made by the defendant company.

"We have not thought it necessary to quote the charge of the court in full, as very much that was said is unexceptionable and has not been challenged. The following excerpts therefrom embody the alleged errors which have been assigned. Speaking of the degree of care which the engineer of the switching engine was bound to exercise, the trial judge said: 'If that was a passageway of that kind, and this plaintiff was upon that passageway or near it at the time of the injury, and the engineer in charge of that engine saw him, and he saw him in time to have prevented any injury to him by the exercise of that amount of care required by the law to be exercised, and that is the highest possible care under the circumstances he could exercise in the management of his engine (we are to bear in mind that these engines are dangerous, and when they are so, and there is danger of their killing and maiming, the man in charge has to exercise all the care possible for him to exercise under the circumstances to prevent that calamity), then, if he saw the plaintiff in time to have stopped his engine, in time to have prevented the injury by the exercise of that reasonable care which he is called upon to exercise in a case of that kind, — the highest possible care he could exercise under the circumstances, — that is exactly what a reasonable man would do when surrounded by such a condition, and it is that reasonable care which he is required to exercise.' Furthermore, the court directed the jury that it was the duty of the engineer 'to use the most effective means to prevent injury.' It was also said that 'if he failed of his duty by failing to exercise the amount of care necessary to discover the presence of the party, there would be a liability on the part of the company.'

"For obvious reasons we have not been able to approve the foregoing portions of the charge which clearly imposed upon the defendant's engineer the duty of exercising 'all the care possible' to prevent the calamity and the 'highest possible care he could exercise under the circumstances,' and which also seem to declare that the railway company was in any event liable, if it failed to exercise the amount of watchfulness necessary to discover the presence of a

party on its track. It does not seem to be seriously claimed by counsel for the defendant in error that the defendant company was bound to exercise the high degree of care indicated by the foregoing extracts from the charge, and it may be safely asserted that the authorities cited do not support such a contention. According to the great weight of authority, the engineer in charge of the switching engine was bound to exercise ordinary care and watchfulness, both in looking out for people who might be on the track at the place in question and in giving them timely warning of the approach of the engine, and in taking other reasonable precautions to avoid injuring them; in other words, the engineer was required to exercise that degree of care and skill which a person of ordinary prudence would have exercised at the time and place of the accident, having reference to the age and size of the boy who was seen in proximity to the track. *Guenther v. St. Louis, Iron Mountain & Southern R'y Co.*, 108 Mo. 18; *Prewitt v. Eddy*, 115 Mo. 283, and cases cited; *International & Great Northern R'y Co. v. McDonald*, 75 Tex. 41.

"In the respects above indicated, the charge of the trial court was undoubtedly erroneous, and we are unable to say that the error in question did not mislead the jury to the prejudice of the defendant company. Inasmuch as the court directed the jury that the defendant's engineer was bound to exercise the 'highest possible care he could exercise under the circumstances,' and inasmuch as the engineer testified that he saw the plaintiff when the switching engine must have been from three to four hundred feet distant from where the accident occurred, it may have been that the jury found against the defendant because the engineer failed to take some precaution which, in the exercise of ordinary care, he was under no obligation to take. The jury may have thought that the engineer had no right to proceed with his engine, no matter how slowly, after the boy was seen in proximity to the track, until he had left that neighborhood and was entirely out of danger; or it may have been that the jury believed the engineer to have been guilty of some other slight error of judgment, which rendered him culpable within the stringent rule of liability announced by the trial court. But it is unnecessary to indulge in speculations of this nature. It is sufficient to warrant a reversal of the case that the charge was erroneous, that it may have misled the jury, and that it does not affirmatively appear that the misdirection was a harmless error. *Atchison, T. & S. F. R. R. Co. v. McClurg*, 19 U. S. App. 346.

"As the case must be remanded for a new trial for the reasons heretofore indicated, it will be well to call attention to another

exception taken to the charge of the trial court touching the assessment of damages, which also appears to us to be well taken. The court instructed the jury that in assessing the plaintiff's damages they had a right 'to take into consideration his mental suffering because of his crippled condition, and to take into consideration his physical suffering endured by him while his wounds were healing.' The allusion thus made to 'mental suffering' induced by the plaintiff's crippled condition, as distinguished from 'physical suffering,' appears to have been to those feelings of mortification which the plaintiff might experience in after life because he was not sound in body and limb. If such was the idea intended to be conveyed by the instruction, then we think that the court erred in allowing the jury to assess damages of that nature. *Bovee v. Town of Danville*, 53 Vt. 190.

"The judgment of the Circuit Court is reversed and the cause is remanded, with directions to grant a new trial." STEPHEN S. BROWN (J. E. DOLMAN with him on the brief), appeared for plaintiff in error; C. A. MOSMAN and JAMES C. DAVIS (SPENCER & MOSMAN and CULVER & DAVIS on the brief), for defendant in error.

**COLLISION BETWEEN WAGON AND TRAIN AT CROSSING — FAILURE TO SIGNAL — STATUTE — TRAVELERS AT CROSSINGS.** — In *CHICAGO, ROCK ISLAND & PACIFIC R'Y CO. v. SHARP* (U. S. Circuit Court of Appeals, Eighth Circuit, September, 1894), 27 U. S. App. 334, collision between wagon and train at crossing; judgment for plaintiff in the U. S. Circuit Court for St. Joseph Division of Western District of Missouri was affirmed, the following opinion being rendered by CALDWELL, CIRCUIT JUDGE:

"This was an action brought by James M. Sharp, the defendant in error, against the Chicago, Rock Island and Pacific Railway Company, the plaintiff in error, to recover damages for a personal injury received at a railroad crossing. The plaintiff recovered judgment below, and the defendant sued out this writ of error.

"In this, as in most cases of this character, the first assignment of error is that the court erred in not directing a verdict for the defendant upon the whole evidence, and in this case, as has frequently occurred in other cases of like character, we are pressed to weigh conflicting evidence, pass upon the veracity of the witnesses, and determine the case according to what we think is the weight of evidence appearing in the record. To do these things would be a flagrant invasion of the functions of the jury, and a denial to the plaintiff of his constitutional right to have the facts of his case tried by a jury. *Northern Pac. R. R. Co. v. Teeter*, 27 U.

S. App. 316; *Northern Pacific R. R. Co. v. Mortenson*, 27 U. S. App. 313; *Gulf, Colorado & Santa Fe R'y Co. v. Ellis*, 10 U. S. App. 640; *Illinois Cent. R. R. Co. v. Kelley's Adm'rs*, 10 U. S. App. 537.

"The following is a summary of the material facts which the plaintiff's testimony tended to establish: The defendant's road crosses on the level the public highway leading south from the city of Maysville, Missouri, at its station near the city, where there are three tracks, known as the 'main track,' the 'passing track,' and the 'stock track,' and two switches. At the point of crossing the railroad runs east and west, and the highway north and south, and the station stands on the north side of the railroad track and west of the highway. At nine o'clock at night, on the 10th day of November, 1892, the plaintiff, riding in a cart — which on the smooth dirt road made no noise — drawn by one horse, going south, approached this crossing. The night was very dark. When within twenty or thirty feet of the crossing he looked and listened; looking west he saw a switch light five or six hundred feet west of the crossing, and looking east he saw a switch light three hundred and sixty-four feet east of the crossing, and a little beyond this he saw the smoke of a locomotive, but could not tell certainly whether it was moving or not, or, if moving, in what direction, though he thought it might be moving towards the crossing. He heard no sound but the puffing of the locomotive. The bell was not ringing and the whistle was not blowing. There was no flagman at the station, and no light there or elsewhere between the two switch lights, and nothing could be seen on the track between the locomotive and the crossing. Satisfied that he could cross the track in safety before the locomotive could reach the crossing, even if it was coming toward him, he started to do so. His horse crossed the track in safety, but the hind end of his cart was struck by a moving flat car, and he received the injuries complained of. It turned out that the locomotive was pushing three or more flat cars toward the crossing, which, owing to the darkness, the plaintiff could not see, and which he did not hear, and which had no light or flagman or other agency on them to give warning of their approach.

"There was conflict in the testimony as to some of these facts, but, when an appellate court is asked to set aside the verdict of a jury in a common-law action upon the facts, all conflict in the evidence must be resolved in favor of the party in whose favor the verdict was rendered; in other words, if by giving credit to the plaintiff's evidence and discrediting that of the defendant the plaintiff's case is made out, the verdict must stand. *Northern Pac. R. R. Co. v. Conger*, 12 U. S. App. 240; *Northern Pac. R. R. Co. v.*



Teeter, 27 U. S. App. 316; Chicago, Mil. & St. Paul R'y Co. v. Lowell, 151 U. S. 209, 7 Am. Neg. Cas. 373.

"The Missouri statute (Revised Statutes of Missouri of 1889, § 2608), requires the bell to be rung or the whistle to be sounded at all public crossings, and a failure to comply with the statute is negligence *per se*. Crumpley v. Hannibal & St. Joseph R. R. Co., 98 Mo. 34. But the negligence of the company does not rest alone on the statute. Independently of the statute, in moving its cars and engines over the public crossing after dark the company was bound to take reasonable and proper means to notify the public of the approach of its cars. In this case no precautions whatever were taken.

"But although the company may have been guilty of negligence the plaintiff cannot recover unless that negligence was the proximate cause of the injury and the plaintiff himself was free from negligence. The obligations, rights and duties of railroad companies and travelers at highway crossings are mutual and reciprocal. No greater degree of care is required of one than of the other. Continental Improvement Co. v. Stead, 95 U. S. 161, 165, 12 Am. Neg. Cas. 687. As was well said by Judge Thayer, in delivering the opinion of the court in the case of Atchison, Topeka & S. F. R. R. Co. v. McClurg, 19 U. S. App. 346, 350, 'A person may reasonably be expected and required to take as great precaution to avoid getting hurt as others are required to take to avoid injuring him.' These rules were clearly and fully stated to the jury in the charge of the learned court that tried the case. The jury were repeatedly told that in approaching the track it was the plaintiff's duty to use his senses and to look and listen for approaching trains, and, if necessary, to stop for that purpose, and that in approaching and crossing the track he was required to exercise that degree of care that a prudent and careful man would exercise under like circumstances. Was there evidence from which the jury might infer that the plaintiff did observe these requirements? He looked and listened as he approached the crossing, and saw and heard nothing but the locomotive. He estimated, and estimated correctly, that he could cross the track many feet ahead of that. The flat-cars, being pushed ahead of the locomotive, he did not hear and could not see on account of the darkness. We are unwilling to lay it down as a rule of law that the plaintiff was negligent in not anticipating the particular act of negligence of the defendant which occasioned the accident. Hutchinson v. St. Paul, Minn. & Manitoba Co., 32 Minn. 398; Weller v. Chicago, Mil. & St. Paul R'y Co., 120 Mo. 635. The jury by their verdict have said that the plaintiff was not required to

conjecture or surmise that the company would attempt to back a train of flat cars, which made little or no noise, over a public crossing in the suburbs of a city, on a dark night, without a brakeman or light or other signal on them to warn the public of their coming, and we concur in that conclusion. Where the negligence of the railroad company which is the proximate cause of the injury is clearly established, in order to defeat a recovery as a matter of law, on the ground of contributory negligence, the defense must be clearly made out. *Chicago, Mil. & St. Paul R'y Co. v. Lowell*, 151 U. S. 209, 7 Am. Neg. Cas. 373. If inferences other than that of contributory negligence may be fairly drawn from all the evidence and facts shown to exist, then the question is one of fact for the jury, whose verdict must stand. *Bluedorn v. Missouri Pac. R'y Co.*, 108 Mo. 439; *Weller v. Chicago, Mil. & St. Paul R'y Co.*, 120 Mo. 635. The charge of the court stated the law applicable to the facts of the case correctly. It was as favorable to the defendant as it had any right to ask. The judgment of the Circuit Court is affirmed." STEPHEN S. BROWN (J. E. DOLMAN on the brief), appeared for plaintiff in error; WILLIAM HENRY and W. H. HAYNES, for defendant in error.

**COLLISION AT CROSSING — PERSON DRIVING KILLED — CONTRIBUTORY NEGLIGENCE FOR JURY.** — In *NORTHERN PACIFIC R. R. CO. v. AUSTIN* (*U. S. Circuit Court of Appeals, Seventh Circuit, November, 1894*), 64 Fed. Rep. 211, judgment for plaintiff in the U. S. Circuit Court for Western District of Wisconsin was affirmed, JENKINS, CIRCUIT JUDGE, rendering the following opinion:

"The defendant in error, as administratrix of the estate of her deceased husband, Willard Austin, brought her action under a statute of the State of Wisconsin to recover damages for the death of her husband, caused by the alleged negligence of the plaintiff in error. The accident by which the deceased came to his death occurred at a highway crossing called, 'Paint Creek Crossing,' some three miles east of Chippewa Falls, on the Wisconsin Central railroad, at the time operated by the plaintiff in error. At that point there was a single track running substantially east and west, crossing the highway at right angles. Westerly from the highway, and for a distance of about 275 feet, the railway runs on a sharp curve through a cut of from ten to fifteen feet, then for 225 feet over a fill, then entering and continuing in a cut westerly for something over 100 rods from the highway. One standing on the railroad track at the crossing is unable to see a locomotive approaching from the west for more than a distance of 600 feet. At a distance of

fifteen feet from the center of the track a locomotive approaching from the west can only be seen within a distance of 100 feet from the crossing. The highway between Chippewa Falls and Cadott, which crosses this railway at the place of the accident, on the southerly side of the railway curved around the intervening hill between the highway and the railway, an approaching train being hidden from the sight of a traveler on that part of the highway for a distance of 300 feet and over before reaching the crossing; and for a distance of about eighty feet from the crossing the intervening hill seriously interferes with the hearing by a traveler upon the highway of the signals of trains approaching the crossing from the west. The accident occurred at about eight o'clock in the morning of the 12th of February, 1892, — a clear, cold, frosty morning. The deceased, who was familiar with the crossing, was driving a fairly spirited team hitched to a pair of bobs. According to the testimony of the engineer of the train, which came from the west, he first observed the deceased when the train was about sixty feet from the crossing; and the horses were about twenty feet from the track. The train had a speed of about eighteen miles an hour, and the horses were traveling at about the rate of six miles an hour. The deceased was standing in the middle of the front bob with his overcoat on, its collar turned up around his face, and a scarf or some such article tied around the collar. The negligence charged was the failure of the engineer to sound the whistle or to ring the bell on the approach of the train to the crossing, and also a failure by the company to restore to its former state of usefulness the highway in question, which had been changed when the railroad was constructed, so that the travel at and south of the crossing must turn to the southwesterly, around the base of the hill, which thus obstructed the view of trains approaching from the west, whereas previously the travel had gone directly over the hill.

“The only question we are asked to review is that of the alleged contributory negligence of the deceased. It is asserted that the undisputed evidence establishes, as a matter of law, such contributory negligence. It is unquestionably true that it is the duty of a court to withdraw a case from the jury where the evidence of contributory negligence is so clear that reasonable minds can draw but one conclusion from the evidence. The question, however, is generally one of mixed fact and law, to be resolved by the jury under proper instructions from the court. *Del., L. & W. R. R. Co. v. Converse*, 139 U. S. 469, 12 Am. Neg. Cas. 668, n; *Elliott v. Railway Co.*, 150 U. S. 245; *Railroad Co. v. Meyers*, 62 Fed. Rep. 367; *Railroad Co. v. Kelly*, 63 Fed. Rep. 407. We cannot say, after a

careful review of the testimony, that, as matter of law, the deceased was guilty of contributory negligence. We think that it was a proper case for submission to the jury, and that it was fairly and fully submitted by the court below. It was undoubtedly the duty of the deceased, in approaching this dangerous crossing, and which he knew to be dangerous, to exercise all due care and caution to avoid injury. It was his duty to listen and to look for approaching trains. Possibly, it was his duty, in view of the surroundings, to have stopped his team, and to have proceeded to the crossing to look for any approaching train; and yet it may well be observed, as was suggested by counsel, that had he done so, and, observing none, returned to his team, a train going at like speed with this one might have come upon the crossing while the deceased was returning to his team and was driving them over the crossing; so that it became a question for the jury to determine whether the deceased did in fact so stop, and look, and listen, and whether, under the circumstances, it was prudent to have so done. The witnesses testifying to being eye-witnesses of the accident were Phipps, the engineer of the train, and one Montana. It is asserted that the evidence of the latter witness establishes that the deceased did not stop, did not look or listen, but drove upon the crossing without using any precautionary measures to discover an approaching train. It may be open to question if his testimony goes so far. But, if it did, a fact is not always established because asserted by the uncontradicted testimony of a witness. There may be circumstances disclosed, impeaching his credibility, of such character as to carry a case to the jury upon the question whether the witness is worthy of belief. There were such circumstances in this case with respect to this witness. It would serve no good purpose to enter into detail, but we think it cannot be said that the jury were unwarranted in refusing credit to his testimony. The evidence of the engineer, Phipps, giving full credence to it, does not so clearly disclose negligence on the part of the deceased, contributing to the injury, that the presumption that he was in the exercise of due care can be said to have been fully rebutted, or to sanction the withdrawal of the case from the jury. When Phipps first saw the team he was within sixty feet of the crossing, his train having a speed of eighteen miles an hour. The team was within twenty feet of the crossing, proceeding at the rate of six miles an hour. A collision would necessarily result within two seconds. This evidence does not tend to show that the deceased had not stopped, and had not proceeded to the track, and looked and listened. It does not appear, with that clearness that would justify the taking of the case from the jury, that after the

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train came within his sight the accident could have been avoided by due care upon the part of the deceased, the burden of proof being upon the company. Undoubtedly there were circumstances attending the actions of the deceased upon the occasion in question, as disclosed by the witnesses mentioned, that, if their evidence may be relied upon, go far to show a want of that care demanded by the dangerous character of this crossing. At the same time, bearing in mind that no one can speak of the transaction from the standpoint of the deceased, and that the credibility of one of the witnesses was seriously impugned, we cannot say that reasonable minds could draw but one conclusion from the testimony, and so authorize us to declare, as matter of law, that the conclusion to which the jury arrived upon the evidence was unwarranted, and counter to the fact and the law. We see no error in the submission of the cause, and no ground calling upon us to disturb the verdict. The judgment will be affirmed." THOMAS H. GILL, appeared for plaintiff in error; S. N. DICKINSON, for defendant in error.

PERSON RUN OVER BY ENGINE IN SWITCHING YARD — TRESPASSER — CONTRIBUTORY NEGLIGENCE. — In KANSAS CITY, FORT SCOTT & MEMPHIS R. R. CO. v. COOK (*U. S. Circuit Court of Appeals, Sixth Circuit, February, 1895*), 66 Fed. Rep. 115, person run over by engine running backward in switching yard of railroad company, judgment for plaintiff in U. S. Circuit Court for Western Division of Western District of Tennessee, was reversed on the ground that plaintiff was a trespasser, and was guilty of contributory negligence, and that defendant's request to instruct the jury that the plaintiff had not made out a case should have been granted. The facts as stated by LURTON, Circuit Judge, who delivered the opinion of the court, were as follows:

"This writ of error was sued out by the Kansas City, Fort Scott & Memphis Railroad Company, against which company the appellee, Jesse H. Cook, recovered a judgment for damages sustained by being run over by a locomotive engine while running backward in its private switching yards in the village of West Memphis, State of Arkansas. The suit was begun in a State Court at Memphis, Tenn., from which the railway company, as a nonresident corporation, removed the suit to the Circuit Court of the United States for the Western Division of the Western District of Tennessee. West Memphis is a small village of from two to three hundred inhabitants, and is immediately on the west bank of the Mississippi river and opposite the city of Memphis. The cars of the appellant company coming from the west and northwest are transferred by a

railway ferry from West Memphis to the east bank of the river. On both banks of the river were inclined railway tracks, by means of which its trains were loaded on or discharged from the steam ferry. These inclined tracks connected with switching yards on both sides of the river, where trains arriving and departing were made up, and where continual switching was going on. The steam ferry was owned and operated exclusively by the railway company, and did not engage in any other business than that of transferring railway trains from one side of the river to the other. The officers of the boats were prohibited from carrying passengers other than those in the company's cars, and its servants and employees. There was a regular steam passenger ferry operated between Memphis and West Memphis for the accommodation of the general public. The defendant in error, a farmer, from the State of Mississippi, and a stranger, was, while visiting friends in Memphis, informed by them that he could pass over the river on railway transfer boats without charge, and from the west side get a better view of a great railway bridge in course of construction across the Mississippi. Acting upon this information, and wholly from motives of curiosity, he, together with some chance acquaintances, went aboard one of the transfer boats, and crossed to West Memphis. His presence on the boat seems to have been unobserved, as no questions were asked him or fare or permit demanded. He then made his way through the yards of the company to a point from which he could examine the railroad bridge. When ready to return, his friends having returned by way of the uncompleted bridge, he made his way back through the switching yard, and down the incline, and onto the transfer boat. He found thereon a passenger train about to be transferred to Memphis. He was asked by the conductor of the train if he had come down on the train, to which he replied that he had not. Shortly afterwards he was approached by one of the officers of the boat, who asked him if he had come across on the boat, who, on being told that he had not, said that the boat did not take passengers, and that he could not return that way. He then asked what he must do, and was told he would have to get off and go to the depot, where he would find a ferry boat which would take him across. He offered to pay to cross, but was told again that the boat did not take passengers across. Cook then says he asked the officer to show him the way he must go, and that the officer took his arm, and told him that he must get off, and must go up the railroad track. The west bank of the river is a low bottom, and subject to overflow. The railroad company, for its own uses, had made an embankment, which was entirely occupied by its tracks and switches.

The top of this embankment was above high water. This embankment and its tracks constituted the switching yard of the company. At the time of the accident, the river was out of its banks, and there was water on both sides of the embankment. On this embankment there were four principal tracks, besides switches and spur tracks. These tracks were quite close together, there being a space of fourteen feet between the center of one track and the center of that adjoining. It was possible to walk between the tracks, there being a minimum of two feet clear space when each track was occupied by the widest cars in use. Between the outside tracks and slope of the embankment it was possible to walk in safety at some points; at others the slope of the embankment was too great. The West Memphis depot was near the northern end of this yard. The regular ferry landing was immediately in the rear of this depot. One of the streets of the village crossed this yard at the north end of the depot, and this street was the route both to depot and ferry landing behind it. There was no other way, in the then stage of the river, for one to get from the transfer boat than that by way of this embankment to the depot. When there, one could turn to the left on this traveled way and go west to the village, or turn to the left and go down to the ferry landing. The point where plaintiff was overtaken and run down was about 250 feet south of the street or way crossing the yard at depot, and on the direct and only way out of the yard, whether he wished to turn east or west when he reached this street. One of plaintiff's witnesses, acquainted with the location, in answer to a question as to whether there was any other way Cook could have gotten up to the depot except by those tracks, said: "After he got off the transfer boat, he would have to come up the tracks to get out anywhere." A plank walk led from back end of depot to the ferry landing. By all the testimony it is shown that engines or trains were in almost continuous motion within the limits of this yard, and all agree that it was an extremely dangerous place for use as a walkway, especially by one unacquainted with the tracks and their uses." \* \* \* [*Reversed.*] E. F. ADAMS and C. H. TRIMBLE (WALLACE PRATT, of counsel), appeared for plaintiff in error; GEORGE GILLHAM, for defendant in error.

*Collisions and crossings.*

Among the numerous cases arising out of accidents at crossings or on railway tracks, decided in the *United States Circuit Courts and Courts of Appeals*, are the following: *HOLLAND v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.*, 18 Fed. Rep. 243 (struck by train while walking across track); *MORRIS v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.*, 26 Fed. Rep. 22 (collision between wagon and

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[This Table shows the Cases Reported, arranged according to States in the order in which they appear in this volume, and classified according to the cause of action and the personal injuries sustained, so far as the facts disclose the same. All CROSSING ACCIDENTS appear under the head of CROSSING, but the same are also classified under FARM CROSSING, GRADE CROSSING, PRIVATE CROSSING, ETC. ACCIDENTS ON STEAM AND STREET-RAILROAD TRACKS are classified under TRACK, and the heads of DRIVING AND PEDESTRIAN distinguish the cases relating to COLLISIONS BETWEEN TRAINS AND VEHICLES, and injuries to PERSONS WALKING ON TRACK, ETC. See also sub-divisions of COLLISIONS and other topics treated in this volume, which will aid the practitioner in his search for authorities under a particular point in negligence cases.]

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